TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1922

No. 407

SEABOARD AIR LINE RAILWAY COMPANY, GUARANTY TRUST COMPANY, AND WILLIAM C. COX, PLAINTIFFS IN ERROR,

versus

THE UNITED STATES, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX

UNITED STATES OF AMERICA—ss:

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the Court House, in the City of Richmond, Virginia, on the first Tuesday in February, being the seventh day of the same month, in the year of our Lord one thousand nine hundred and twenty-two.

Present: Hon. Charles A. Woods, Circuit Judge; Hon. Edmund Waddill, Jr., Circuit Judge; Hon. E. Y. Webb, District Judge.

Among other were the following proceedings, to-wit:

The United States, Plaintiff in Error,

versus

Seaboard Air Line Railway Company, Guaranty Trust Company, and William C. Cox, Defendants in Error.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston.

Be it Remembered that heretofore, to-wit, on September 5, 1921, the transcript of the record of the said District Court in the said entitled cause was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows:

TRANSCRIPT OF RECORD

Filed September 5, 1921.

CAPTION.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF SOUTH CAROLINA.
IN THE DISTRICT COURT. AT LAW.

At a District Court of the United States for the Eastern District of South Carolina, begun and held at the Court House in the City of Charleston, S. C., on the first Tuesday in June, being the seventh day of the same month, in the year of our Lord one thousand nine hundred and twenty-one.

Present: The Honorable Henry A. M. Smith, United States District Judge for the Eastern District of South Carolina.

Among other were the following proceedings, to-wit:

eaboard Air Line Railway Company, a corporation organized and existing under the laws of the State of South Carolina, and Guaranty Trust Company of New York, a corporation organized and existing under the laws of the State of New York, as Corporate Trustee, and William C. Cox, as individual Trustee, Petitioners,

versus

he United States, Defendant.

PETITION.

Filed August 9, 1920.

the Honorable Henry A. M. Smith, United States District Judge for the Eastern District of South Carolina:

The Petitioners above named allege:

FIRST: That your Petitioner, Seaboard Air Line Railway Company, at the times hereinafter mentioned was and now is a Corporation duly chartered and organized by and under the laws of the State of South Carolina; and was, and now is a resident and citizen of Charleston County, in the Eastern District of the State of South Carolina.

SECOND: That your Petitioner, Guaranty Trust Company of New York, at the times hereinafter mentioned was and now is a Corporation duly chartered and organized by and under the laws of the State of New York.

THIRD: That at the times hereinafter named the Petitioner, Seaboard Air Line Railway Company was the owner for railroad purposes, subject to the lien of the mortgage to the Petitioners, Guaranty Trust Company of New York and William C. Cox, securing an indebtedness from Seaboard Air Line Railway Company to Guaranty Trust Company of New York, as Corporate Trustee, and William C. Cox as individual Trustee (3) of the following described premises, to-wit:

"Beginning at a point on the easterly boundary of the right-of-way of the Seaboard Air Line Railroad one hundred and ten (110) feet north of the thread of Filbin Creek; thence northerly along the said eastern boundary line three hundred sixty-eight and one-tenths (368.1) feet; thence north eight degrees ten minutes (8° 10') East nine hundred eighty-five and six-tenths (895.6) feet; thence southerly one thousand two hundred thirty-five and twenty-five one-hundredths (1235.25) feet; thence south forty-five degrees West (45° W.) one hundred fifty-five and five-tenths (155.5) feet; thence west thirty (30) feet to the point of beginning, containing two and six-tenths (2.6) acres (113,885 square feet), more or less, situate in the County of Charleston State of South Carolina, said land being part of the Seaboard Air Line Railroad Yards and adjoining what is known as the 'Charleston Port Terminal.'"

which said premises formed a part of a strip of land conveyed to said Seaboard Air Line Railway Company by North Charleston Corporation by deed dated March 7th, 1917, for railroad purposes, said deed containing the following provisions: "And the said North Charleston Corporation further binds itself and its successors and assigns not to open or attempt to open any streets, avenues, public road or highways, across the said parcel of land hereinabove described and hereby conveyed; the intention being that the said Seaboard Air Line Railway Company, its successors and assigns, shall have the right to the sole and exclusive use of the said premises, so long as the same is used for railroad purposes."

FOURTH: That under and by virtue of Sec. X of an Act of Congress entitled "An Act to provide further for the national security and defence by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel", approved August 10, 1917, the President of the United States, on or about May 23rd, 1919, requisitioned the above described property of the Petitioners to provide storage facilities for supplies necessary to the support of the Army and other public uses connected with the public defense.

FIFTH: That thereupon the Defendant, the United States, entered upon the exclusive use and occupation of the premises so requisitioned, and erected thereon trackage facilities for use in connection with the storage of supplies for the Army and other public uses connected with the common defense, and remained in exclusive use and enjoyment of the said premises.

SIXTH: That in and by said Act of August 10, 1917, (4) it is, among other things, provided that the President shall ascertain and pay just compensation for property so taken, and, if the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as would be just compensation for such necessaries or storage space, and

jurisdiction is conferred on the United States District Courts to hear and determine all such controversies.

That under the said provision, the President of the United States, acting through the War Department Board of Appraisers, determined the compensation to be paid to the petitioners to be the sum of Two hundred and thirty-five Dollars and eighty Cents ($235.80) with interest thereon at the rate of Six (6%) per cent per annum, from May 23rd, 1919, to the date of voucher for final payment; that the compensation so determined was not satisfactory to the Petitioners, of which fact the Petitioners duly notified the Defendant: That thereupon the Petitioners demanded of the Defendant Seventy-five per centum of the amount determined as aforesaid to be just compensation: but the defendant has failed to pay the said sum or any part thereof, and petitioners under the provisions of the said Act enabling them thereto bring this their petition and sue the defendant, the United States, to recover such further sum as when added to the seventy-five per centum will make up such amount as will be just just compensation for the property of the petitioners requisitioned as aforesaid.

SEVENTH: That on information and belief the petitioners allege that the sum of One hundred thousand ($100,000.00) dollars is just compensation for the property as hereinabove described and requisitioned.

WHEREFORE the Petitioners pray that they may have judgment against the defendant for the sum of Ninety-nine thousand eight hundred & twenty-three and fifteen-one-hundredths ($99.823.15) dollars, together with interest at the rate of Seven (7%) per centum per annum from the 23rd day of May, 1919, such amount being such sum as when added to the Seventy-five per centum to be paid to the Petitioners as aforesaid, will be (5) just compensation for their property requisitioned as herein alleged, also the costs and disbursements of this action.

BUIST & BUIST,
Attorneys for Petitioners.

(Petition verified by each Petitioner.)

ANSWER.

(6) Filed November 2, 1920.

THE UNITED STATES, the Defendant in the above named cause, by Francis H. Weston, United States Attorney for the Eastern District of South Carolina, answering the Petition of the Petitioners above named; alleges:

ONE: Defendant admits the allegations contained in paragraphs First, Fourth, Fifth and Sixth, of the said Petition.

TWO: Defendant has not sufficient information to form a belief as to the allegations contained in paragraphs Second and Third of the said Petition, and therefore denies the same, and demands stricts proof thereof.

THREE: Defendant denies the allegations contained in paragraph Seventh of the said Petition.

AND FOR FURTHER DEFENSE: This Defendant alleges that acting under the authority of the said Act of August 10th, 1917, an inquiry was had to determine the value of the said property, more fully described in the Petition of the Petitioners herein, and the same was duly determined to be Two Hundred and Thirty-five Dollars and Eighty cents ($235.80), which Defendant al-
(7) leges to be a fair and full value, and just and ample compensation for the property described in the said Petition of the Petitioners, and which said sum Defendant is willing and ready to pay.

WHEREFORE, The Defendant prays that the Petition be dismissed with costs.

FRANCIS H. WESTON,
United States Attorney,
Attorney for Defendant.

(Answer verified by U. S. Attorney.)

ORDER FOR JURY ISSUE.

(8) Filed November 17, 1920.

Motion has been made in behalf of the Petitioners in above case for an issue of fact to be framed by the Court for submissiong to a jury. The Counsel for Petitioners and defendant have appeared on said motion.

For the reasons heretofore given in the case of *Filbin Corporation, et al.*, vs. *United States*, recently under consideration in this Court,

IT IS ORDERED AND ADJUDGED, That it shall be submitted to a jury at the next term of this Court, or at any term thereafter, as soon as it can conveniently be tried, to determine in this case the following issue, viz:

What, on May 23rd, 1919, was the fair and reasonable value which would constitute a just compensation to be paid for the taking for public purposes of the lands mentioned and described in the Petition herein.

HENRY A. M. SMITH,
U. S. District Judge.

November 17, 1920.

VERDICT.

"We, find that the fair and reasonable value which would constitute a just compensation to be paid for the taking for public purposes on 23 May, 1919, of the lands mentioned and described in the Petition, under the issue herein to be Six Thousand Dollars.

H. W. RICHARDSON, Foreman."

May 5, 1921.

ORDER OF JUDGMENT.

(9) Filed May 9, 1921.

UNITED STATES OF AMERICA, EASTERN DISTRICT OF SOUTH CAROLINA, IN THE DISTRICT COURT.

Seaboard Air Line Railway Company, a corporation organized and existing under the laws of the State of South Carolina, and Guaranty Trust Company of New York, as Corporate Trustee, and William C. Cox, as individual Trustee, Petitioners,

against

The United States, Defendant.

An order having been made in the above entitled cause on the 17th day of November, 1920, referring it to a jury to find what, on 23 May, 1919, was a fair and reasonable value which would constitute a just compensation to be paid for the taking for public purposes of the lands mentioned and described in the petition herein, and the said issue having come on to be tried at a special term of this Court held in the City of Charleston, on Tuesday, the 3rd day of May, 1921, and the cause having been tried on said issue, and thereupon the jury having found the total amount to be paid under the said issue to be Six thousand 00/100 Dollars ($6,000.00);

Now, on consideration of the same, it is:

ADJUDGED AND DECREED, That the said amount of Six thousand 00/100 ($6,000.00) Dollars, constitutes the just compensation to be paid for the taking on May 23, 1919, for public purposes of the lands mentioned and described in the petition herein, and the Court doth hereby order, adjudge and decree that the petitioners recover of the defendant the said sum of Six thousand 00/100 Dollars ($6,000.00) with interest (10) from the 23rd day of May, 1919, at the rate of seven (7%) per cent per annum (the Statutory rate in South Carolina), under the decision of the Supreme Court of the United States made February 28, 1921, in the case of *United States* vs. *Rogers, et al.*, and costs.

HENRY A. M. SMITH,
U. S. District Judge.

May 9, 1921.

BILL OF EXCEPTIONS.

(11) Filed August 31, 1921.

Be it remembered that at a Special Term of the Dis-

trict Court of the United States for the Eastern District of South Carolina, holden in the City of Charleston, in the State of South Carolina, on the 3rd day of May, 1921, the above entitled cause came on for trial before the Honorable Henry A. M. Smith, Judge of the said Court, upon the pleadings and Orders to be set out in this record as follows:

(Petition. Heretofore set out in Record.)

(Answer. Heretofore set out in Record.)

(Order for Jury issue filed November 17, 1920. Heretofore set out in Record.)

That thereupon a jury having been duly empannelled, the following issue was submitted for determination:

"ISSUE FOR JURY AT TRIAL.

3 May, 1921.

What, on May 23rd, 1919, was the fair and reasonable value which would constitute a just compensation to be paid for the taking for public purposes of the lands mentioned and described in the petition herein?

HENRY A. M. SMITH,
U. S. District Judge."

(12) That thereupon testimony was taken on behalf of the Petitioners and Respondent, and after a Charge to the Jury by the Presiding Judge, the following verdict was rendered:

"VERDICT.

We find that the fair and reasonable value which would constitute a just compensation to be paid for the taking for public purposes on 23 May, 1919, of the lands mentioned and described in the Petition, under the issue herein to be Six Thousand Dollars.

H. W. RICHARDSON, Foreman."

May 5th, 1921.

That thereafter on the 9th day of May, 1921, and Order was filed decreeing judgment on behalf of the Petitioners against Defendant for the sum of SIX THOUSAND DOLLARS, with interest from the 23rd day of May, 1919, at the rate of seven per cent (7%) per annum, and costs.

(Order of Judgment, May 9th, 1921, heretofore set out in Record.)

The foregoing constitutes a statement of everything that transpired at the trial essential to the determination of the questions herein raised and to be decided, and The Defendant prays that this Bill of Exceptions may be allowed settled, signed and sealed.

FRANCIS H. WESTON,
United States Attorney,
Attorney for Defendant.

It is agreed that this shall constitute the Bill of Exceptions in this case.

BUIST & BUIST,
Attys. for Petitioners S. A. L. Ry. Co.

Settled 31 August, 1921.

HENRY A. M. SMITH, (L. S.)
U. S. District Judge.

ASSIGNMENT OF ERRORS.

(13) Filed August 31, 1921.

The United States in connection with its Petition for Writ of Error, makes the following Assignments of Error; that it avers occurred in connection with the trial of the foregoing cause, and in proceedings had in pursuance thereof:

FIRST: That his Honor the Presiding Judge erred in the Judgment Order filed May 9th, 1921, in decreeing that the Petitioners recover of the Defendant, interest

on the sum of SIX THOUSAND DOLLARS ($6,000.00), from the 23rd day of May, 1919, at the rate of seven per cent (7%) per annum (the Statutory rate if South Carolina), under the decision of the Supreme Court of the United States, made 28th February, 1921, in the case of *United States* versus *Rogers, et al.*

SECOND: That his Honor the Presiding Judge erred in decreeing that the Petitioners were entitled to interest on the said verdict, from the 23rd day of May, 1919.

THIRD: That his Honor the Presiding Judge erred in decreeing that the Petitioners were entitled to interest at the rate of seven per cent (7%) per annum, the (14) Statutory rate in South Carolina.

FOURTH: That his Honor the Presiding Judge erred in decreeing that the Petitioners were entitled to interest on the said verdict, under decision of the Supreme Court of the United States, made 23rd February, 1921, in the case of *United States* versus *Rogers, et al.*

WHEREFORE, Defendant prays that the Judgment Order of the Court be modified and reversed, and the said cause remanded for such other and further proceedings as may be deemed proper in the premises.

FRANCIS H. WESTON,
United States Attorney,
Attorney for Defendant.

MEMORANDUM.

(15) Petition for writ of error and allowance filed August 31, 1921.

Writ of Error issued and filed August 31, 1921.

Bond on Writ of Error (None).

Citation filed August 31, 1921.

Service acknowledged August 31, 1921.

STIPULATION FOR CLERK TO MAKE UP RECORD

Filed August 31, 1921.

It is hereby stipulated and agreed that the Clerk of this Court shall make up a transcript of the record in the above styled cause, and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va., and that it be printed under the supervision of the Clerk of that Court, in accordance with Rule 23.

FRANCIS H. WESTON,
U. S. Attorney,
Counsel for Plaintiff in Error.
BUIST & BUIST,
Counsel for S. A. L. Ry. Co., and others.
Defendants in Error.

August 31, 1921.

CLERK'S CERTIFICATE.

(16) IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.
AT LAW.

I, Richard W. Hutson, Clerk of the District Court of the United States for the Eastern District of South Carolina, do hereby certify, that the foregoing is a true and correct copy of the record and proceedings in the case of Seaboard Air Line Railway Company, et al., Petitioners, against The United States, defendant, together with the Order of Judgment and all papers relating to the same, as appears by the original record now on file in my office.

Given under my hand and seal of said Court, at Charleston, S. C., in the district aforesaid, this 2nd day of September, 1921.

(Seal of Court)

RICHARD W. HUTSON,
C. D. C. U. S., E. Dist. S. C.

On the same day, to-wit, September 5, 1921, the iginal petition for writ of error, order allowing writ error, writ of error and citation are certified up under e. 7 of Rule 14.

Same day, the appearance of Francis H. Weston, U. Attorney; J. Waties Waring, Assistant U. S. Attor-y, and Howard W. Ameli is entered for the plaintiff error.

September 23, 1921, the appearance of Henry Buist l Geo. L. Buist is entered for the defendants in er-.

September 24, 1921, twenty-five copies of the printed ord are filed.

STIPULATION AS TO BRIEFS.

Filed October 26, 1921.

It is hereby stipulated and agreed by and between nsel for the Plaintiff in Error, and counsel for De-dant in Error, in the above entitled cause, that the e for filing their respective Briefs is extended as fol-s: That is to say, that Brief on Behalf of Plaintiff Error is to be filed not later than October 20th, 1921, Brief for the Defendant in Error not later than No-ber 3rd, 1921.

FRANCIS H. WESTON,
United States Attorney,
Attorney for Plaintiff in Error.
BUIST & BUIST,
Attorney for Defendant in Error.

ber 15th, 1921.

ARGUMENT OF CAUSE.

November 23, 1921 (November Term, 1921,) cause e on to be heard before Woods and Waddill, Circuit ges, and Webb, District Judge, and is argued by sel and submitted.

OPINION.

Filed February 7, 1922.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT.

No. 1921.

The United States, Plaintiff in Error,
versus
Seaboard Air Line Railway Company, Guaranty Trust Company, and William C. Cox, Defendants in Error

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In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston.

(Argued Nov. 23, 1921. Decided Feb. 7, 1922.)

Before Woods and Waddill, Circuit Judges, and Webb, District Judge.

Francis H. Weston, U. S. Attorney (G. L. B. Rivers, Assihstant U. S. Attorney, and Howard W. Ameli on brief), for plaintiff in error, and George L. Buist (Buist & Buist on brief) for defendants in error.

Waddill, Circuit Judge:

This is a writ of error to a judgment of the United States District Court for the Eastern District of South Carolina, in an action at law, wherein the plaintiff in error was defendant, and the defendant in error was plaintiff.

The facts of the case are briefly these: On the 23rd day of May, 1919, the President of the United States pursuant to the provisions of the act of Congress of the 10th of August, 1917, familiarly known as the Lever "National Defense Act," requisitioned and possessed himself of certain lands mentioned and described in the proceedings, for governmental purposes, in order to provide storage facilities for supplies necessary to the support of the army, and other public uses connected with the public defense; and the President, pursuant to section 10 of said act, caused to be appropriately ascertained what was just compensation to be paid by the government for the property taken, with which valuation the plaintiff was dissatisfied, and instituted this suit for the purpose of recovering such reasonable and fair valuation as he alleged would constitute just compensation for the lands taken. The government duly appeared, admitted the facts as to the taking of the property, and its possession thereof, but denied the valuation placed on the land by the plaintiffs, and insisted that the government valuation was the fair and full value therefor, and constituted just and ample compensation, which amount the government was ready to pay.

Issue being joined, on plaintiff's motion, a jury was impaneled to ascertain what would constitute just compensation for the property taken, and on the 5th of May, 1920, a verdict was returned, awarding to the plaintiff Six thousand dollars, the value as of the date of the taking of the property. On the 9th of May, 1920, judgment was entered upon the verdict against the United States, for the amount thereof, with interest from the 23rd day of May, 1919, the date on which the property was taken, at the rate of seven per cent, the court stating that to be the statutory rate of interest in South Carolina. To the entry of this judgment, the United States, by its Attorney, excepted, and the case is here upon writ of error to test the validity of the same.

Several assignments of error are presented, but the one pressed and relied upon by the government, all other

questions being in effect waived, is as to the allowance of interest on the judgment, from any time and at any rate.

Did the district court err in awarding interest at the rate of seven per cent upon the verdict, from the date of the taking of the property, some two years antedating the rendition of the same? This is the sole question at issue in this case.

Section 10 of the Lever Act provides that the President may requisition foods, feeds, fuels and other war supplies, and necessary storage facilities, and that he shall ascertain and pay just compensation therefor, and if any person is not satisfied with the President's award, he is to receive seventy-five per cent of the award, and for the balance of the claim "shall be entitled to sue the United States * * and jurisdiction is hereby conferred on the United States district courts to hear and determine all such controversies". Under this section, the district court is given full and complete jurisdiction to hear and determine all controversies arising from taking property of the kind in question, where the amount fixed by the President is deemed by the property owner insufficient, and he may sue, and the parties are entitled to a trial by jury to ascertain the just compensation for the property taken. (*United States* v. *Pfitsch*, U. S. , decided June 1st, 1921, not yet reported).

It has long been recognized, by an almost unbroken line of federal decisions, as well as by the invariable practice of the executive departments, that interest will not be allowed against the government, save where payment thereof is expressly stipulated for by contract, or is given in terms by the act of Congress under consideration. Citations from the supreme and inferior courts to sustain this view, might be given almost without number, but only a few need be mentioned. In *Pacific Coast Steamship Co.* v. *United States*, 33 Ct. Cl. 36, Judge Howry, at page 49, aptly states the doctrine, as follows:

"Interest, therefore, as a rule, is the creature of the statute. The courts have announced this proposition so often, and text writers have so generally accepted the same as correct, it may now be said to be axiomatic that unless the warrant for the payment of interest be found in the statute interest can not be collected. The princi-

ple is well settled that the United States are not liable to pay interest on claims against them in the absence of statutory direction. This is so whether such claims originate in contract or in tort, or whether they arise in the ordinary course of business with the Government, or under legislation making appropriations for specific relief. The only recognized exceptions are where the Government stipulates to pay interest and where it is expressly given by an act of Congress, either by the name of interest or by that of damages. The practice has long prevailed in the Departments of not allowing interest on claims presented, liquidated or unliquidated, except in some way specially provided for. The Supreme Court adopted this rule from a succession of the opinions of the Attorneys-General of the United States in a well-considered case on the subject, from which we know of no settled departure. (*Angarica* v. *Bayard*, 127 U. S. 251; see also *Gordon* v. *United States*, 7 Wall 188; *Harvey* v. *United States*, 113 U. S. 243, 249; *United States* v. *New York*, 160 U. S. 619.)"

In one of the very latest cases, *United States* v. *Rogers*, 255 U. S. 163, relied on by the lower court, in which interest was allowed in condemnation proceedings instituted by the government, Mr. Justice Day, speaking for the court, said:

"It is unquestionably true that the United States upon claims made against it, cannot in the absence of a statute to that end, be subjected to the payment of interest. *Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *North Carolina*, 136 U. S. 211, 216, cited and approved in *National Volunteer Home* v. *Parrish*, 229 U. S. 494, 496. In the present case the landowners did not sue upon a claim against the Government, as was the fact in *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330".

In the *Rogers case*, Mr. Justice Day cited *United States* v. *North American Transportation Co.*, 253 Fed. 333, 334, 335, 336 and 337, a suit in its essential features like the one here, save that the latter came from the Court of Claims, and nearly twenty years had elapsed between the taking of the property, and the rendition of the judgment. In the last named case, Mr. Justice Bran-

deis most comprehensively reviews the authorities bearing on the entire subject, from which it will readily be seen that irrespective of what may be done in condemnation proceedings, brought by the Government against a citizen, interest will not be allowed where the government is being sued. This case would seem to remove all doubt on this generally accepted well settled question, and shows that the Government, entirely regardless of what may be said of the injustice of its position, has hitherto consistently held to its right as at common law, not to be charged with the consequences of loss arising from delays, even if hardships ensue. The result in this respect, is similar to the refusal to allow costs to be taxed against the government, or to be held responsible for the tortious acts of its agents. These conditions necessarily arise in dealing with the Sovereign, and for which there is no redress.

The case of *Tillson* v. *United States*, 100 U. S. 43, will be found of special application here. There, Congress referred to the Court of Claims to "investigate * * * and ascertain the amount equitably due as damages for alleged breach of contract, and the question arose as to whether by the use of the word "equitable", it was not intended by the act that interest should be allowed on the award. The Supreme Court, speaking through Chief Justice Waite, said, at p. 46:

"But if Congress had desired to grant such authority, it would have been easy to have said so in express terms; and because it did not say so, we are led irresistably to the conclusion that it did not intend to give any such power".

Cases arising under sec. 10 of the Act of March 3rd, 1887 (now sec. 24, par. 20 of the Judicial Code), conferring on district and circuit courts jurisdiction to hear certain claims against the government, though the inhibition against the allowance of interest applies only to the court of claims, and not specially to those courts, they invariably, as far as is known, disallow interest, unless the same is either stipulated for, or given by act of Congress. *Marvin* v. *United States*, 44 Fed. 405; *United States* v. *Barbour*, 74 Fed. 483; *United States* v. *Sargeant*, 162 Fed. 81; *Scully* v. *United States*, 197 Fed. 827.

In other cases before district courts, arising under special acts of Congress, generally in admiralty cases, *Watts* v. *United States*, 129 Fed. 222, 226; *Pennell* v. *United States*, 162 Fed. 75, those tribunals likewise, and for like reasons, invariably refused to allow interest in that class of litigation. The executive branches of the government have been no less positive in their refusal to allow interest on claims against the government, than have the courts to make any ruling on the same subject, the former going to the extent of insisting upon interests on amounts due it, in the adjustment of claims, and at the same time denying to the creditors the like right. *United States* v. *Vendier*, 164 U. S. 213, 218, 219.

The court based its ruling in this case upon the decision of *United States* v. *Rogers*, *supra*, 255 U. S. 163, a condemnation proceeding, and it is earnestly insisted, as it is necessary to do, in order to bring this case within the ruling in that case, that this is virtually a condemnation proceeding. Nothing could be further from the fact, as viewed by the court. What is, and what is not a condemnation proceeding, can hardly be the subject of serious discussion from a legal standpoint. It is one in which the Government in the exercise of its power of eminent domain, one of its most important requisites of sovereignty, institutes its suit against the citizen to acquire title to property, upon the awarding of just compensation for what is proposed to be taken. The Government is the actor, the mover. The citizen is the defendant, brought in involuntarily, for the purpose of having taken from him property belonging to him, upon compensation being made therefor. Upon the lawful conclusion of such proceeding, and payment of the amount awarded for the property taken, title thereto vests in the government. In such proceedings, especially where conducted under the conformity act in states in which interest is allowed on condemnation awards, interest may, in some instances, have been awarded against the government; but the decision in the case of *United States* v. *Rogers*, *supra*, 255 U. S. 163, is believed to be the first and only case in which it has been suggested that interest could be awarded independent of such statute, if the court meant to so state, which is doubtful, it merely saying, on the contrary, that it was not so bound because of the existence of the State statute, but nevertheless

thought it a convenient and fair method of ascertaining the sum to which the owner of the land was entitled. The vital point in that case was that there was a state statute allowing interest. The district court and the circuit court of appeals followed the same in making the allowance of interest, which action the Supreme Court affirmed. As before shown, in that case the Supreme Court expressly recognized the doctrine of the disallowance of interest against the government, and it was careful to distinguish between that case, and that of *United States* v. *North American Transportation Co.*, 253 Fed. 330, *supra*, which we think is conclusive of this case.

The present case is in no sense a condemnation proceeding. Here, the Congress, in the exercise of its war powers, in express terms authorized the President, Commander in Chief of the Army, to requisition the property taken for National Defense purposes, and to pay a just compensation for the same, and in case of dissatisfaction by the person whose property was taken, he was to receive at once seventy-five per cent of the award, and was given permission to sue in the United States District Court for the residue.

Such action is but a plain and simple suit at law, to recover from the government upon an implied contract to pay for property lawfully taken, but not paid for. Mr. Justice Brandeis, in the case of *United States* v. *Pfitsch*, *supra* (not yet reported), speaking for the Supreme Court, considering especially the effect of Sec. 10 as conferring this jurisdiction upon the district courts, aptly refers to the same as "the usual procedure of a district court in actions at law for money compensation," and it was held that the right of trial by jury existed in such case. See also *United States* v. *Langford*, 101 U. S. 341; *Schillinger* v. *United States*, 155 U. S. 163, 166; *Temple* v. *United States*, 248 U. S. 121, 129; *United States* v. *North American Transportation Co.*, 253 U. S. 330, *supra*. It will not be found that interest has ever been awarded against the government in such a case, or class of cases. The fact that the district court hears the case, not as a court of claims, but solely under clause 10 of the Lever act, with the right of trial by jury, makes no difference, since interest can be allowed only when the act of Congress plainly makes provision therefor.

A review of other sections of the Lever act, author-

izing the requisition of property, will give added strength to the views herein expressed.

Section 12 relates to factories, mines and pipe lines; section 16 to distilled spirits, and sec. 25 to coal or coke mines or businesses. Each of these three sections provides in identical terms that a person dissatisfied with the President's award, shall be entitled to sue the United States, but each section makes provision for suit against the United States to recover just compensation, in terms materially different from those of sec. 10, that is to say, these three sections provide for suits (sec. 145 Jud. Code) in the Court of Claims where the amount in controversy exceeds the sum of $10,000.00, and in the district courts (sec. 24, para. 20 Jud. Code), concurrent with the Court of Claims, where the amount involved is less than $10,000. The Court of Claims is inhibited from awarding interest prior to the time of the rendition of the judgment, unless the same be expressly stipulated for (Sec. 177, Jud. Code), and a district court sitting as a court of claims, at least by analogy, has no greater or other power. It can hardly be conceived that Congress in making provision for payment of property requisitioned by the Government, under the same act, meant to deny interest to claimants under some sections of the law, and to leave it open to courts to allow the same on awards under other provisions thereof.

In reaching its conclusion, the court has no discretion in allowing or withholding interest, nor can it be influenced by mere equitable consideration, of what may appear in a particular case to be just and right. The fact that Congress has or has not seen fit to make provision for the payment of interest, must be its guide. It may not substitute its judgment for that of Congress, and it should be slow to assume that Congress did not act advisedly and wisely in foreseeing that during a great war, and the period following its conclusion, all sorts and kinds of claims would have to be met and adjusted, necessarily consuming much time, and almost inevitably involving heavy loss to the government. Under these conditions, Congress rightfully refused to impose upon the Government the further burden of paying interest on claims, pending delays incident to such contests. Indeed, all claim of injustice on the part of the Government is silenced, when it undertook voluntarily the pay-

ment in advance of seventy-five per cent of its award, on account of such claims. Assuming the present case to be fairly typical of those likely to arise, it will readily be seen how far-reaching and important the question is. Here the President's appraisers have fixed the value of the property to be taken at $235.80, one-fourth of which is $58.95. Suit was instituted to recover $100,000.00, and the jury rendered a verdict in favor of the plaintiff for $6,000.00, upon which seven per cent interest per annum was allowed by the court, antedating the judgment some two years. Thus the annual interest allowed on the debt, was almost twice the amount of the government's original valuation.

The judgment of the lower court will be reversed and a new trial awarded, unless the defendant in error shall within sixty days from the date of the judgment hereon, file with the clerk of the lower court, and a copy thereof with the clerk of this court, a remittitur abating all interest upon the judgment.

Reversed.

WOODS, Circuit Judge, dissenting:

Section 10 of the Act of August, 1917, 40 Statutes, 276, 279, provides:

"That the president is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the army or the maintenance of the navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to seventy-five per centum, will make up such amount as will be just compensation for such necessaries or storage place, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies."

Under this Act the President, on May 23, 1919, requisitioned and took possession of a parcel of land, the property of the Seaboard Air Line Railway Company, and ascertained its value to be $235.80, but paid no part of the estimated value. Being dissatisfied with this valuation the Railway Company on August 9, 1920, sued the United States to recover $99,823.15—the difference between $100,000.00, the alleged value of the property, and seventy-five per centum of the value fixed by the President, and interest thereon from the date of the taking. On trial the following issue was submitted to the jury without objection:

"What, on May 23, 1919, was the fair and reasonable value which would constitute a just compensation to be paid for the taking for public purposes of the lands mentioned and described in the Petition herein?"

On May 5, 1921, the jury found the fair and reasonable value of the land on May 29, 1919, to be $6,000.00. Thereupon the court entered judgment in favor of the railway company for $6,000.00 with interest from May 23, 1919.

The United States brings the case here assigning error in the allowance of interest from the date of the taking of the land in its value at that date as fixed by the jury.

Section 177 of the Judicial Code forbids the Court of Claims to allow interest on claims against the Government until after judgment. The general proposition, that interest cannot be allowed on claims against the Government unless it is so provided by statute, is too well settled for discussion. Authorities on this general proposition are cited in *United States* v. *North American T. & T. Co.*, 253 U. S. 330. That suit being in the Court of Claims, although brought by the owner for the value of land taken, interest was denied because the statute forbade it. But the court says: "It may be that interest could be collected as part of the just compensation in condemnation proceedings brought by the Government".

In *United States* v. *Rogers*, 255 U. S. 163, at page 169, the court thus states the rule:

"It is unquestionably true that the United States, upon claims made against it, cannot, in the absence of a statute to that end, be subjected to the payment of interest. *Angirica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *North Carolina*, 136 U. S. 211, 216, cited and approved in *National Volunteer Home* v. *Parrish*, 229 U. S. 494, 496. In the present case the landowners did not sue upon a claim against the Government, as was the fact in *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330. The Government was seeking for purposes authorized by statute to appropriate the lands, and it had actually taken them, and had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran.

In fixing the compenastion, the District Court, and the Circuit Court of Appeals in affirming the judgment, followed the New Mexico statute fixing the rate of interest at 6 per cent. This was in conformity with a former ruling of the Circuit Court of Appeals applying the statutes of Minnesota to lands appropriated in that State. *United States* v. *Sargeant*, 162 Fed. 81.

The Government urges that the Conformity Act of August 1, 1888, does not require the United States Government to be bound by the rule of the State statute in the allowance of interest. This may be true, but we agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled."

There is no denial in the majority opinion in the case before us that just compensation required by the Constitution is not complete without the payment of the value at the date of the taking with interest to the date of payment. But interest is denied on the ground, (1) that this proceeding under Section 10 is not a condemnation proceeding; and (2) that, even if it is a condemnation proceeding, it is not one instituted by the United States but an independent suit instituted by the owner of the land.

Any proceeding prescribed or authorized by a state or the federal legislature to acquire land for public purposes and to ascertain just compensation for it is a condemnation proceeding; and every step taken in it from

the beginning to the end is a part of the condemnation. It may be a suit by the Government before taking without other proceeding, as *Kohler* v. *United States*, 91 U. S. 367, 376. In *Garrison* v. *United States*, 21 Wall. 196, at page 204, the court says: "The proceeding to ascertain the benefits or losses which will accrue to the owner of property when taken for public use, and thus the compensation to be made to him, is in the nature of an inquest on the part of the State, and is necessarily under her control. It is her duty to see that the estimates made are just, not merely to the individual whose property is taken, but to the public which is to pay for it." In *Kennebec Water Dist.* v. *Waterville*, 96 Me. 236; 52 Atl. 774-789, condemnation is defined to be "a special proceeding, provided and authorized by the sovereign power by whose authority the property is taken, to determine a specific fact. The proceedings are in the nature of an inquisition on the part of the state." See also *Filbin Corporation* v. *United States*, 265 Fed. 354. The title does not vest in the Government until the just compensation has been ascertained on a fair hearing and actually paid. *Garrison* v. *United States*, *supra*.

It seems to me perfectly clear that the taking and method of ascertainment of value and payment prescribed by Section 10 is a condemnation proceeding instituted by the Government. The Congress has in one section prescribed an exclusive and complete scheme of condemnation to be instituted by the Government. Each successive step prescribed by the statute—the taking, the tentative ascertainment of value, the payment of seventy-five per centum of such valuation, the suit by a dissatisfied land owner—is a part of one condemnation proceeding instituted by the United States. This being so it seems to follow the land owner is entitled to interest on the value at the date of the taking until payment, on the authority of *United States* v. *North American T. & T. Co.*, 253 U. S. 330, and *Roger* v. *United States*, 255 U. S. 163.

The distinction that a land owner is entitled to interest when the Government institutes the proceeding but not entitled to it when the Government forces him to institute it, is admittedly mounted on a technicality having no foundation in justice. It seems to me, to deny interest justly due in this case is to further displace the just

compensation required by the Constitution by the additional technical holding that the suit brought by the land owner is not a part of the condemnation proceeding instituted by the United States.

JUDGMENT.

Filed and Entered February 9, 1922.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT.

No. 1921.

The United States, Plaintiff in Error,

versus

Seaboard Air Line Railway Company, Guaranty Trust Company, and William C. Cox, Defendants in Error.

In Error to the District Court of the United States for the Eastern District of South Carolina.

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of South Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that this cause, be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of South Carolina, at Charleston, with directions to set aside the judgment complained of, also the verdict, and grant a new trial, unless the defendant in error, within sixty days

from the date of this judgment, files with the clerk of the lower court, and a copy thereof with the clerk of this court, a *remittitur* abating all interest upon the judgment entered by the said District Court. In case said *remittitur* is filed, then the judgment entered by the said District Court is affirmed. If it is not so filed, then the judgment of the said District Court is reversed, with directions to set aside the verdict and grant a new trial in accordance with the opinion of this Court filed herein.

EDMUND WADDILL, JR.,
U. S. Circuit Judge.

February 9th, 1922.

On another day, to-wit, March 13, 1922, the mandate of this Court in this cause is issued and transmitted to the U. S. District Court at Charleston, South Carolina, in due form.

Same day, the original petition for writ of error and order allowing writ of error are returned to the Clerk at Charleston, South Carolina.

JOINT PETITION FOR RECALL OF MANDATE.

Filed April 11, 1922.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

The United States, Plaintiff in Error,

versus

Seaboard Air Line Railway Company, Guaranty Trust Company, and William C. Cox, Defendants in Error.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston.

To the Honorable the United States Circuit Court of Appeals for the Fourth Circuit:

Your petitioners respectfully move that the mandate in this case be recalled for the reason that your petitioners desire to file with this Honorable Court a petition for an order reforming the judgment so as to make it final.

FRED K. DYAR,
Special Asst. to the Atty. General,
Atty. for Plaintiff in Error.
BUIST & BUIST,
Attys. for Defendant in Error.

JOINT PETITION FOR REFORMATION OF JUDGMENT.

Filed April 11, 1922.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 1921.

The United States, Plaintiff in Error.

versus

Seaboard Air Line Railway Company, Guaranty Trust Company, and William C. Cox, Defendants in Error.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston.

To the Honorable the United States Circuit Court of Appeals for the Fourth Circuit:

Your petitioners respectfully show:

1. That it is the desire of both parties to this cause that the question presented to this Court and decided by it should be presented for review to the Supreme Court of the United States without further delay, following the procedure in the case of *Thomsen* v. *Cayser*, 243 U. S. 66.

2. That it is the desire of both parties to this cause, without however a waiver by the defendants in error of their right to rely upon errors in the judgment of the Court, that the judgment of this Honorable Court be reformed so as to be final.

Therefore, your petitioners pray that the judgment of the Court be reformed so as to be made final.

FRED K. DYAR,
Special Asst. to the Atty. General,
Atty. for Plaintiff in Error.
BUIST & BUIST,
Attys. for Defendant in Error.

ORDER RECALLING MANDATE.

Filed and Entered May 1, 1922.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 1921.

The United States, Plaintiff in Error,

versus

Seaboard Air Line Railway Company, Guaranty Trust Company, and William C. Cox, Defendants in Error.

In Error to the District Court of the United States fo
the Eastern District of South Carolina,
at Charleston.

Upon the joint application of the parties to thi
cause, by their attorneys, and it appearing that a peti
tion for reformation of judgment is about to be pre
sented in this cause,

It is Ordered that the mandate of this Court issue
in this cause and transmitted to the District Court fo
the Eastern District of South Carolina on March 1
1922, be, and the same is hereby, recalled.

It is further ordered that the Clerk of this Cour
forthwith transmit a certified copy of this order to th
said District Court, at Charleston, South Carolina.

EDMUND WADDILL, JR.,
U. S. Circuit Judge.

Richmond, Va., May 1st, 1922.

(MEMO. CLERK: Mandate returned by the Clerk o
the U. S. District Court, at Charleston, South Carolina
in pursuance of the foregoing order.)

FINAL JUDGMENT.

Filed and Entered May 1, 1922.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT.

No. 1921.

The United States, Plaintiff in Error,

versus

Seaboard Air Line Railway Company, Guaranty Trus
Company, and William C. Cox, Defendants in Error.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston.

Upon considering the joint application of the parties to this cause, by their attorneys,

It is Ordered that the judgment of this Court filed and entered herein on February 9, 1922, be, and the same is hereby vacated and set aside.

It is further Ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed without a new trial, and that this cause be remanded to the District Court of the United States for the Eastern District of South Carolina, at Charleston, with instructions to enter a judgment for the defendants in error (petitioners below) for six thousand dollars, without interest.

MARTIN A. KNAPP,
C. A. WOODS,
EDMUND WADDILL, JR.,
U. S. Circuit Judges.

Richmond, Va., May 1st, 1922.

STIPULATION AS TO AMOUNT IN CONTROVERSY.

Filed May 1, 1922.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 1921.

The United States, Plaintiff in Error,

versus

Seaboard Air Line Railway Company, Guaranty Trust Company, and William C. Cox, Defendants in Error.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston.

It is hereby stipulated and agreed by counsel for the parties to the above entitled cause that the amount in controversy therein is interest at the rate of 7% per annum upon the amount of the judgment of the United States District Court for the Eastern District of South Carolina, to-wit, Six Thousand ($6,000) Dollars, from the date of the taking of the property involved by the United States on May 23, 1919, which said interest, at the present time, exceeds One Thousand ($1,000) Dollars, besides costs.

FRANCIS H. WESTON,
United States Attorney for the Eastern District of South Carolina.
FRED K. DYAR,
Special Assistant to the Attorney General,
BUIST & BUIST,
Attorneys for Defendants in Error (petitioners below).

PETITION FOR WRIT OF ERROR.

Filed May 1, 1922.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 1921.

The United States, Plaintiff in Error,

versus

Seaboard Air Line Railway Company, Guaranty Trust Company, and William C. Cox, Defendants in Error.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston.

To the Honorable the United States Circuit Court of Appeals for the Fourth Circuit:

The petition of Seaboard Air Line Railway Company and Guaranty Trust Company of New York and William C. Cox, respectfully shows:

1. That a final judgment was rendered on May 1st, 1922, against your Petitioners in this Honorable Court in an action at law entitled as above brought here by Writ of Error from the United States District Court for the Eastern District of South Carolina.

2. That this case is an action at law arising under Section 10 of the Act of Congress of August 10th, 1917, (Lever National Defense Act) for the determination of just compensation to be paid by the United States Government for land taken for war purposes.

3. That the jurisdiction of the Court in this action is not dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states, nor is it a case arising under the patent laws, nor under the copyright laws nor under the revenue laws, nor under the criminal laws, nor is it an admiralty case. The amount in controversy is the interest at seven per cent on Six thousand ($6,000.00) dollars from the twenty-third day of May, 1919, which at the time of the rendition of judgment by the United States Circuit Court of Appeals was in excess of one thousand ($1,000.00) dollars, besides costs.

4. That this case is a proper case for review by the Supreme Court of the United States and your petitioners consider themselves aggrieved by the judgment of this Court and desire to have the judgment of this Court reviewed and passed upon by the Supreme Court of the

United States in the particulars set out in certain assignments of error filed herewith.

Wherefore, your Petitioners pray that a Writ of Error will now be granted to them removing the said cause to the Supreme Court of the United States so that the assignments of error may be there considered and reviewed, and your Petitioners will ever pray, etc.

BUIST & BUIST,
Attorneys for Petitioners.

ASSIGNMENT OF ERRORS.

Filed May 1, 1922.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT.

No. 1921.

The United States, Plaintiff in Error,

versus

Seaboard Air Line Railway Company, Guaranty Trust Company, and William C. Cox, Defendants in Error.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston.

Now comes Seaboard Air Line Railway Company and Guaranty Trust Company of New York and William C. Cox, Petitioners, and complain that many and mani-

fest errors have been committed by this Court, to the grievous injury of your petitioners, in rendering final judgment, which said errors are as follows:

1. That the Circuit Court of Appeals erred in reversing the Judgment of the District Court.

2. That the Circuit Court of Appeals erred in refusing to allow interest as an element of just compensation.

3. That the Circuit Court of Appeals erred in deciding that the term "just compensation" as used in Section 10 of the Act of Congress of August 10th, 1917 (Lever National Defense Act) cannot be construed to mean a fixed sum plus interest thereon.

4. That the Circuit Court of Appeals erred in reversing the finding of the District Court that a fixed sum with interest thereon constitutes just compensation under Section 10 of the Act of Congress of August 10th, 1917 (Lever National Defense Act).

5. That the Circuit Court of Appeals erred in failing to find as a matter of law that the term "just compensation" may be measured partially in interest.

6. That the Circuit Court of Appeals erred in instructing the District Court that the judgment to be entered in favor of petitioners should be without interest.

7. That the Circuit Court of Appeals erred in holding that a proceeding under Section 10 of the Act of Congress of August 10th, 1917 (Lever National Defense Act), is not a condemnation proceeding.

8. That the Circuit Court of Appeals erred in holding that the District Court erred in awarding interest upon the verdict from the date of the taking of the property, the two sums together constituting just compensation.

9. That the Circuit Court of Appeals erred in failing to hold that the allowance of a fixed sum plus interest is a proper, fair and convenient method of determining

just compensation to be awarded to a landowner for land taken under Section 10 of the Act of Congress of August 10th, 1917 (Lever National Defense Act).

BUIST & BUIST,
Attorneys for Petitioners.

ORDER ALLOWING WRIT OF ERROR.

Filed May 1, 1922.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 1921.

The United States, Plaintiff in Error,

versus

Seaboard Air Line Railway Company, Guaranty Trust Company, and William C. Cox, Defendants in Error.

The foregoing petition is granted and writ of error allowed as prayed for, upon defendants in error's giving bond according to law in the sum of *Five hundred dollars.*

It is further ordered that the record to be transmitted in this case shall be the same as the record upon which this case was heard in the Circuit Court of Appeals for the Fourth Circuit, together with a transcript of all proceedings had and taken in the case on said writ of error, and subsequent thereto, including the opinion of the said Circuit Court of Appeals.

EDMUND WADDILL, JR.,
Judge of the United States Circuit Court of Appeals for the Fourth Circuit.

May 1, 1922.

WRIT OF ERROR.

Issued May 1, 1922.

UNITED STATES OF AMERICA, SS:

The President of the United States, to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit.—Greeting:

Because in the record and proceedings, as also in the rendition of judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between The United States, plaintiff in error, and Seaboard Air Line Railway Company, Guaranty Trust Company, and William C. Cox, defendants in error, a manifest error hath happened, to the great damage of the said defendants in error as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this first day of May, in the year of our Lord one thousand nine hundred and twenty-two.

CLAUDE M. DEAN,
Clerk of the United States Circuit Court of Appeals
for the Fourth Circuit.

Allowed by

EDMUND WADDILL, JR.,
Judge of the United States
Circuit Court of Appeals for
the Fourth Circuit.

SERVICE OF WRIT OF ERROR.

The foregoing writ of error is served by lodging a copy thereof for the adverse party in the Clerk's Office of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, where the record remains, on the first day of May, 1922.

Attest:

(Seal of Court) CLAUDE M. DEAN, Clerk.

CITATION.

Issued May 1, 1922.

UNITED STATES OF AMERICA, ss:

The President of the United States, to the United States —Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the City of Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fourth Circuit, and wherein you are plaintiff in error and the Seaboard Air Line Railway Company, Guaranty Trust Company, and William C. Cox are defendants in error, to show cause, if any there be, why the judgment rendered against the said Seaboard Air Line Railway Company, Guaranty Trust Company, and William C. Cox, defendants in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edmund Waddill, Jr., Judge of the United States Circuit Court of Appeals for the Fourth Circuit, this first day of May, in the year of our Lord one thousand nine hundred and twenty-two.

EDMUND WADDILL, JR.,
Judge of the United States Circuit Court of Appeals for the Fourth Circuit.

SERVICE OF CITATION.

Service accepted at Columbia, S. C., this 6th day of May, A. D., 1922.

FRANCIS H. WESTON,
United States Attorney for the Eastern District of South Carolina.

BOND.

Filed May 20, 1922.

KNOW ALL MEN BY THESE PRESENTS, That we, Seaboard Air Line Railway Company, Guarantee Trust Company and William C. Cox, as principals, and National Surety Company, as surety, are held and firmly bound unto the United States of America, in the full and just sum of Five Hundred Dollars ($500.00), to be paid to the said United States of America to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents. SEALED with our seals and dated this 19th day of May, in the year of our Lord one thousand nine hundred and twenty-two.

WHEREAS, lately at the February Term of the United States Circuit Court of Appeals for the Fourth Circuit, in a suit depending in said Court between The United States, Plaintiff in Error, and Seaboard Air Line Railway Company, Guaranty Trust Company, and William C. Cox, Defendants in Error, a judgment was rendered against the said Seaboard Air Line Railway Company, Guaranty Trust Company, and William C. Cox, Defendants in Error, and the said Seaboard Air Line Railway Company, Guaranty Trust Company, and Will-

iam C. Cox, Defendants in Error, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The United States, citing and admonishing it to be and appear in the Supreme Court of the United States at the City of Washington, District of Columbia, within thirty days from May 1, 1922.

NOW, THE CONDITION of the above obligation is such that if the said Seaboard Air Line Railway Company, Guaranty Trust Company and William C. Cox shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void else to remain in full force and effect.

SEABOARD AIR LINE RAILWAY COMPANY,

By ROBT L. NUTT,
As Vice-President.

Witnesses:
M. F. DOLAN, JR.,
E. J. ELLIOTT,
As to Seaboard Air Line Railway Company.

Attest:
F. L. NELLIS,
As Assistant Secretary.

(Seal)

GUARANTY TRUST COMPANY,

By M. P. CALLAWAY,
As Vice-President.

Witnesses:
THEODORE QUIMLY,
JNO. R. DOUGLASS, JR.,
As to Guaranty Trust Company.

Attest:
C. M. DREWRY,
As Assistant Secretary.

(Seal)

WILLIAM C. COX. (L. S.)

Witnesses:
W. J. BARROWS,
JAMES KIRKHAM,
As to William C. Cox.

NATIONAL SURETY CO.,
As Surety.

By RO. T. RAVENEL,
As Atty. in Fact.
(Seal)

Witnesses:
H. O. McMILLAN,
LUCYE IRENE BOATWRIGHT,
As to Surety.

Attest:

.....
As

Approved by:

EDMUND WADDILL, JR.,
Judge of the United States Circuit Court of Appeals for the Fourth Circuit.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 24th day of May, A. D. 1922.

(Seal of Court)

CLAUDE M. DEAN, Clerk
U. S. Circuit Court of Appeals,
Fourth Circuit.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

No. 407

SEABOARD AIR LINE RAILWAY COMPANY, GUARANTY TRUST COMPANY OF NEW YORK, AND WILLIAM C. COX,
Plaintiffs in Error.

v.

THE UNITED STATES, *Defendant in Error*

BRIEF FOR PLAINTIFFS IN ERROR

J. HARRY COVINGTON,
JAMES F. WRIGHT,
Of Counsel

HENRY BUIST,
GEORGE L. BUIST,
FORNEY JOHNSTON,
Attorneys for Plaintiffs in Error

RANSDELL INCORPORATED, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

No. 407

SEABOARD AIR LINE RAILWAY COMPANY, GUARANTY TRUST COMPANY OF NEW YORK, AND WILLIAM C. COX,
Plaintiffs in Error.

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THE UNITED STATES, *Defendant in Error*

BRIEF FOR PLAINTIFFS IN ERROR

J. HARRY COVINGTON,
JAMES F. WRIGHT,
Of Counsel

HENRY BUIST,
GEORGE L. BUIST,
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TABLE OF CASES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

No. 407.

SEABOARD AIR LINE RAILWAY COMPANY, GUARANTY TRUST COMPANY OF NEW YORK, AND WILLIAM C. COX, *Plaintiffs in Error,*

v.

THE UNITED STATES, *Defendant in Error.*

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE

The sole question presented by this record is whether in an inquest under Section 10 of the Lever Act to determine "just compensation" for the emergency seizure of private lands by the United States, in advance of the ascertainment, award or payment of compensation, the owner is entitled to any allowance to represent the uncompensated loss of the use of his property or its equivalent, between the date of the seizure and the date when compensation for the bare value of the land at the time of seizure is awarded.

The first step in the proceeding in which this writ of error is the final act was a seizure by the United States

under Section 10 of the Lever Act* of two and six-tenths (2.6) acres of land owned by the appellant, Seaboard Air Line Railway Company, and constituting part of its railroad yards, adjoining the Charleston Port Terminal, in Charleston, South Carolina (Petition, Printed Record, pp. 2–3, admitted by the answer of the United States, p. 5).

The seizure was set in motion by the President on May 23, 1919, by the "requisitioning" of the property mentioned, in order "to provide storage facilities for supplies necessary to the support of the Army and other public uses connected with the public defense"; in pursuance of which action the United States entered upon, and has continued in the exclusive use and occupation of the premises so requisitioned (*id.*, p. 3).

In line with the procedure fixed by section 10 of the statute for the award and payment of compensation the President, through War Department machinery, under-

*Section 10 of the Act approved August 10, 1917, Chap. 53, Sixty-Fifth Congress (40 Stat. L. 276), entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," reads as follows:

> "SEC. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies: *Provided*, That nothing in this section, or in the section that follows, shall be construed to require any natural person to furnish to the Government any necessaries held by him and reasonably required for consumption or use by himself and dependents, nor shall any person, firm, corporation, or association be required to furnish to the Government any seed necessary for the seeding of land owned, leased, or cultivated by them."

took to ascertain the compensation to be paid by the United States, and arrived at $235.80, *"with interest thereon at the rate of six (6%) per cent per annum,* from May 23, 1919," the date of seizure, "to the date of voucher for final payment," as the amount determined by the President as constituting the just compensation payable to the Seaboard for the taking (*id.*, p. 4). This sum was not satisfactory to the Seaboard and due notice to that effect was given to the United States, and payment of 75% of the President's proposal was demanded as a predicate to judicial determination of the question of just compensation under the procedure authorized by the statute quoted (p. 4).

The President failing to comply with the statute as to payment of 75% of the amount proposed by him, or any part of that amount, the function of determining compensation was thereupon carried into the United States District Court for the proper district, that Court having been given exclusive jurisdiction by the statute (see section 10 and *U. S.* v. *Pfitsch*, 256 U. S. 547) to hear and determine "all such controversies."

The petition which carried the controversy into the District Court was not an action *ex delicto* or *ex contractu;* but followed generally the language of the statute, reciting the facts, and requesting judgment of an amount which petitioner conceived to be adequate, when added to the amount proposed by the President, to constitute just compensation. The tentative or preliminary finding and determination by the President recognized that an allowance measured by or equivalent to interest was an essential element of just compensation; for it proposed to allow

> *"interest at the rate of (6%) per cent per annum, from May 23, 1919, to the date of voucher for final payment"*

as part of the *compensation* to be paid the owner; and the petition filed by the Seaboard in the District Court

affirmatively sought the recovery of that element, to be computed from May 23, 1919, as part of the just compensation to which the owner was entitled* (p. 4).

Before the decision on June 1, 1921, of *United States* v. *Pfitsch*, 256 U. S. 547, sundry proceedings, including the one at bar, were pending under section 10 of the Lever Act in the District Court for the Eastern District of South Carolina, and came on for consideration on motions of petitioners to transfer the causes to the jury docket, or else that issues as to compensation be framed for submission to a jury. The learned District Judge reached the conclusion, announced in *Filbin Corporation* v. *United States*, 265 Fed. 354, that the proceeding in the District Court under section 10 was in substance and effect part of a condemnation proceeding, instituted by the requisition and taking possession of the property, in which the United States is the actor, and that the property owner was either entitled as of right to a jury or else that it was proper for the court to call in the aid of a jury "for the assistance of his conscience" as to the fair value of the land. On these premises the District Judge made up an issue in the *Filbin Case* as to the fair and reasonable value of the land on the date of requisition and seizure (265 Fed. at p. 360).

Following that precedent in the case at bar, the same court, on November 17, 1920, made up an issue for determination by a jury as to the fair and reasonable value which *on May 23, 1919*, would have constituted just compensation for the taking of the lands in question; the jury found that $6,000 was the condemnation value to be paid on May 23, 1919, and the District Court accordingly awarded judgment in favor of the petitioners for $6,000

*The Guaranty Trust Company of New York and William C. Cox, as Trustees under S. A. L. Railway Company's First and Consolidated Mortgage covering the property requisitioned, joined in the petition in the District Court. For the sake of brevity, the Seaboard is treated throughout this brief as the sole owner.

and for interest at the rate of seven per cent (7%) per annum, the statutory rate in South Carolina, from the date of the seizure, "under the decision of the Supreme Court of the United States made February 28, 1921, in the case of *United States* v. *Rogers*"* (p. 7).

No exception was reserved by either party as to the form in which the issue was submitted to the jury, viz, the single question of the value of the land *on May 23, 1919*, or to the form of the verdict of the jury which, responsive to the issue submitted, found that the reasonable value necessary to constitute just compensation *to be paid on May 23, 1919*, was $6,000. As stated, this cause was tried before the decision in *U. S.* v. *Pfitsch, supra*, and under a procedure, inaugurated by the Court without objection from either party so far as appears from this record, which did not submit the entire question of compensation to the jury and necessarily left with the court the necessity of so framing its judgment as to award full compensation in accordance with the prayer of the petition. No demurrer was interposed or exception taken to the petition by the United States. Under these circumstances, the judgment of the court was that petitioners recover the May 23, 1919, value of the lands as established by the verdict of the jury, *plus* interest on that value from May 23, 1919.

The Government excepted to the judgment in allowing interest on $6,000 from May 23, 1919 (First and Third Exceptions, Record pp. 9–10), erroneously characterized as interest *on the verdict of the jury* in the second and fourth exceptions (*ib.*), and appealed to the Circuit Court of Appeals for the Fourth Circuit, which held that proceedings under section 10 of the Lever Act are not in substance and effect condemnation proceedings, that the

* " * * * we agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled." *U. S.* v. *Rogers*, 255 U. S. 163, 169.

award of interest by the trial court was a mere allowance of interest on a claim against the United States which, as interest, is said to be prohibited to the District Court under general principles; and, on those premises, reversed the judgment of the District Court by remanding the cause with instructions to enter a judgment for petitioners for six thousand dollars, flat, *without interest,* or any other allowance or provision to compensate the owners for the period during which they were out of possession and uncompensated (Record, p. 31). To review that final judgment of the Court of Appeals, petitioners sued out this writ of error, the amount involved being within the jurisdiction of this Court and so stipulated (Record, pp. 31–32).

The record on which the judgment of the District Court was carried by the United States to the Circuit Court of Appeals, and on which this appeal is now before the Supreme Court, omitted all of the evidence and testimony. In passing to the argument it must therefore be conclusively presumed that, if any formal evidence was or is necessary to sustain the allowance of interest or its equivalent as an element or measure of compensation in this proceeding—and we do not consider formal evidence to be necessary, for reasons to be stated —such evidence was before the trial court; if, indeed the finding and determination by the President that interest should be added to the base award proposed by him was not of itself sufficient.*

*The charge of the trial court in this proceeding in submitting the question of value and damage, as of May 23, 1919, to the jury was published at the request of the Government in 275 Fed. 77. The question of value and damages turned largely around the question whether the property should be valued (a) in the light of the expenditure by the United States of some $16,000,000 in developing adjacent property (275 Fed. 83), in respect to which the Court instructed the jury adversely to the owners; and (b) for prospective yard purposes, in respect to which the question of damage to the residue resulting from the taking of part of the yard was submitted to the jury.

SPECIFICATION OF ERRORS

The specification of errors relied upon are set out in the assignment of Errors on which the writ of error to this Court was allowed (Record, pp. 34–36). They may be restated and condensed as follows:

The Circuit Court of Appeals erred in its judgment reversing the judgment of the District Court in the following respects:

(1) In rendering final judgment for the flat sum of $6,000, found by the jury to be the bare value of the land on the date of its seizure, May 23, 1919, without the allowance of compensation in the form of interest or its equivalent, or otherwise, for the uncompensated loss of the use by the owners of their land between the date of seizure by the United States and the date of the ascertainment and award of compensation for the bare land value at the time of seizure;

(2) In its failure to hold that just compensation within the meaning of Section 10 of the Lever Act (40 Stat. L. 276) must, *ex vi termini*, make due allowance for the reasonable and necessary period of ouster of the owners from the possession and enjoyment of their land intervening between the date of seizure and the date of rendering compensation for the land itself;

(3) In failing to recognize in the loss of the use of the land, or its equivalent in money, an essential element of just compensation under the Fifth Amendment and under Section 10 of the Lever Act, for a seizure of lands under the power of eminent domain resulting in an ouster of the owners prior to the ascertainment and payment of compensation for the fair value of the land itself;

(4) In failing to recognize that this proceeding under Section 10 of the Lever Act is in substance and effect a "compensation proceeding" or "condemnation proceeding," within the meaning of those terms as employed in *U. S.* v. *Rogers*, 255 U. S. 163,

and *U. S.* v. *North American Transportation and Trading Co.*, 253 U. S. 330;

(5) In failing to give effect to the principle that "having taken the land * * *, it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 341"—quoted in *U. S.* v. *Rogers*, 255 U. S. 163, 169—and in erroneously holding, in effect, that the procedure for the ascertainment and rendition of just compensation provided by Section 10 of the Lever Act falls short of making provision for just compensation within the full purport and intent of the Fifth Amendment;

(6) In failing to recognize that the allowance of interest or an allowance in the nature of interest or measured by interest is a fair and just method for awarding compensation to the owners for the loss and deprivation, within the meaning of the Fifth Amendment, proximately resulting from the seizure of their lands under the circumstances shown by this record and accompanied by the provisions for the award of compensation such as are here involved.

MAIN PROPOSITIONS AND AUTHORITIES

I

(a) Just compensation within the meaning of the compensation clause of the Fifth Amendment means the "full and perfect equivalent"—the "exact equivalent"—of that of which the property owner has been deprived by the taking. (b) Section 10 of the Lever Act, dealing with the requisition of property, prescribes an exclusive and plenary procedure according to which property may be taken under the power of eminent domain and under which the owner may have established an award of such sums "as will be just compensation," within the full meaning of that term, wholly without reference to any fictions as to implied contracts or to limitations, if any,

inhering in actions on implied contracts in the Court of Claims.

(a) *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312.

(b) Section 10, Lever Act (40 Stat. L. 276).

II

An emergency seizure of property under the power of eminent domain, in advance of the payment of "just compensation" must be accompanied by an adequate and effective remedy, adapted to the nature and character of the property and of the taking; by which the owner may have full compensation determined and paid without unreasonable delay.

Bragg v. *Weaver*, 251 U. S. 57, 62;
Crozier v. *Krupp*, 224 U. S. 290 (306);
Cherokee Nation v. *So. Kansas Ry.*, 135 U. S. 641, 659;
Sweet v. *Rechell*, 159 U. S. 380, 402;
Butler v. *Sewer Commissioners*, 39 N. J. Rep. 665 (672);
Petition of the United States, 96 N. Y. 227.

III

Just compensation for property seized or requisitioned under the power of eminent domain must not only constitute the full and perfect equivalent of that of which the owner has been deprived by the taking, and on the basis of a judicially ascertained or tested quantum of compensation, but the procedure for the ascertainment and award of compensation must be certain, prompt, and free from undue or unreasonable risk or vexatious features.

Authorities cited, Propositions I and 11, *supra*.

IV

Where property is seized under the power of eminent domain under an otherwise valid statute, but without proper or adequate assurances of the prompt ascertainment and payment of full compensation, the seizure is illegal and the property owner may restrain the agents of

the United States asserting dominion over the property unless and until full compensation is paid or assured, or he may maintain an action against the individuals invading his property.

Filbin Corp. v. *U. S.*, 265 Fed. 354 (356);
U. S. v. *Great Falls Mfg. Co.*, 112 U. S. 645 (656);
United States v. *Lee*, 106 U. S., 196;
Authorities cited, *supra.*

V

The procedure for the determination and award of full compensation as a judicial question (and not as an executive or legislative conclusion) is, in the absence of waiver or of contract by the property owner, express or implied, an indispensable prerequisite to a lawful seizure of private property for public use and is in itself a part of the eminent domain proceeding, that is, "a part of the process of condemnation, without which title to the property could not be acquired by the governing body for public purposes" and in the absence of which the property owner "would have the right by injunction to exclude any person, whether authorized by the President or not, unlawfully in possession, or to sue any individuals in possession for damages for trespass."

Proposition II, *supra;*
Filbin Corporation v. *U. S.*, 265 Fed. 354, 358;
Monongahela Nav. Co. v. *U. S.*, 148 U. S. 312;
Shoemaker v. *U. S.*, 147 U. S. 282, 302;
National City Bank v. *U. S.*, 275, Fed. 855 (861);
C. G. Blake Co. v. *U. S.*, 275 Fed. 861, affirmed 279 Fed. 71;
U. S. v. *New River Collieries Co.*, 276 Fed. 690;
Gulf Refining Co. v. *U. S.*, Court of Claims June 12, 1922;
Hudson Navigation Co. v. *U. S.*, Court of Claims, June 12, 1922;
Albert Hanson Lumber Co. v. *U. S.*, 277 Fed. 897;
Prince Line v. *U. S.*, 283 Fed. 535;
U. S. v. *Benedict*, 280 Fed. 76, affirming 270 Fed. 267.

VI

(a) Statutes are to be construed, if possible, so as to harmonize their provisions with the Constitution; and (b) where the statute is remedial, they should be liberally construed in favor of the citizen whose property has been appropriated to public use. On these premises as well as on the plain meaning of the unconditional terms employed, the statutory procedure for the determination and payment of the compensation provided by Section 10 of the Lever Act should be construed as intending to provide for full compensation under the Constitution.

(a) *St. Louis S. W. R. Co.* v. *Arkansas,* 235 U. S. 350, and Cases cited Section 80, I Fed. Stat. Ann. (2nd Ed.) 107.

(b) *Logan* v. *Davis,* 233 U. S. 6135
Cases cited Section 94, I Fed. Stat. Ann. (2nd Ed.) 119.

VII

Since an express statutory restriction against the allowance of any element of just compensation due a property owner within the judicial construction of that term is void and will be ignored by the court (*Monongahela Case,* 148 U. S. 312, 327) a mere rule of policy based on the indisposition of the Government in actions *ex contractu* to pay interest, as such, should not be extended in a plenary proceeding established to award full compensation, by analogy or otherwise, so as to restrict the allowance of a sum measured by or in the nature of interest if the latter is judicially found to be a necessary element of just compensation.

Authorities cited, Proposition VI, *supra.*

VIII

In compensation or condemnation proceedings where the seizure of land under the power of eminent domain is prior to the award of compensation to the owner, the

allowance of interest on the flat value of the land or an allowance measured by or in the nature of interest, is appropriate as a fair and convenient method of arriving at the amount of just compensation due to the owner.

U. S. v. *Rogers*, 255 U. S. 163;
U. S. v. *North American Co.*, 253 U. S. 330, and authorities cited;
U. S. v. *Rogers* (C.C.A.), 257 Fed. 397—"The addition required was not interest as such, but a sum equal to interest";
U. S. v. *Sargent*, 162 Fed. 81, and cases cited p. 84;
20 CORPUS JURIS 807, *et. seq.*, and cases cited;
LEWIS, Eminent Domain (3rd Ed.), Section 742, p. 1319, *et seq.*
NICHOLS, Em. Dem. (2nd Ed.), p. 1016.

IX

There is no rational distinction to be made between the compensation to be awarded in a plenary compensation proceeding under Section 10, Lever Act, and the compensation to be awarded in a condemnation proceeding such as *U. S.* v. *Rogers, supra;* for the direct statutory process for the ascertainment and rendition of compensation provided by Section 10 of the Lever Act is an indispensable accompaniment of the lawful seizure of property in advance of compensation, and rests on no implied contract or other supposedly restrictive form of action as a basis for the inquiry.

U. S. v. *Benedict*, 280 Fed. (C.C.A.) 76;
Prince Line v. *U. S.*, 283 Fed. 535;
Filbin Corporation v. *U. S.*, 265 Fed. 354;
Dissenting opinion of Woods, J., in *U. S.* v. *Seaboard Air Line Railway Co.*, 280 Fed. at p. 355, Record, p. 22.

X

There being no waiver by the owner or fiction of implied contract, or other restrictive procedure, forced, as the only alternative to resistance, on the owner under the plenary inquiry as to compensation provided by Sec-

tion 10 of the Lever Act, there is no sound reason why the essential nature of the proceeding as a "compensation proceeding" within the meaning of the opinions in *U. S.* v. *Rogers* and *U. S.* v. *North American Co., supra,* should be ignored. The synthesis and substantial unity of the "controversy" before the District Court with and as a part of the process for the lawful condemnation of this property is not to be doubted.

U. S. v. *Great Falls Mfg. Co.*, 112 U. S. 645, at p. 658;
Crozier v. Krupp, 224 U. S. 290, at p. 305;
U. S. v. *New York*, 160 U. S. 598; a claim made against an Executive Department transmitted to the Court of Claims for a report is only a continuation of the original proceedings;
The Nuestra Senora De Regla, 108 U. S. 92, capture and prize court proceedings instituted by the United States and resulting in order of restitution, followed up by owner as proceeding to determine compensation.

Whether identical in technical characteristics or not, the same principles as to compensation must obtain, if the procedure for the award of compensation is sufficient to assure just compensation under the Constitution.

Authorities, *supra;*
20 Corpus Juris 1158-9, and many cases cited.

The nomenclature by which the parties to a controversy are designated has never prevented this Court from penetrating to the substance of the matter. Proceedings under Section 10 of the Lever Act are essentially subject to the observation of this Court that:

> "In condemnation proceedings the words plaintiff and defendant can be used only in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no part or threatened wrong. Both parties are actors: one to acquire title, the other to get as large pay as he can." *Mason City R. Co.* v. *Boynton*, 204 U. S. 570, 575.

The proceeding before this court is neither an action *ex delicto*, for the taking was lawful (assuming that full

compensation is recoverable in this proceeding); nor an action *ex contractu*, for the owner entered into no contract and pleads none. The proceeding is a direct, plenary inquiry to award full compensation in all of its elements.

XI

Rental, or the value of the use of property, is, particularly in the absence of evidence of rental value, commonly measured by analogous interest rates.

In Re Condemnation of Lands for Military Camp, 250 Fed. 314;
N. Y. etc. Co. v. *Fraser*, 130 U. S. 611;
Nahhas v. *Browning*, 183 Pac. 442, 6 A.L.R. 476;
Louisville etc. Co. v. *Schuester*, 183 Ky. 504, 209 S.W. 542, and note, 4 A.L.R. at p. 1363;
Moore v. *King*, 23 S.W. 484;
23 R. C. L. 911, 912.

An analogy is the fact that the right to a fair rate of return on utility property has a tangible relation to interest rates.

Lincoln Gas Case, 250 U. S. 256, *et passim*.

XII

That interest or its equivalent may be an element of compensation in an inquiry involving the assessment of compensation is not to be doubted, even where the Government is the party against whom the award is to be made.

Award under Jay Treaty of 1794, Opinion by William Pinkney, American Commissioner, MOORE, *International Arbitrations*, page 4316;
The Nuestra Senora De Regla, 108 U. S. 92;
U. S. v. *New York*, 160 U. S. 598;
U. S. v. *Rogers*, 257 Fed. 397, 400;
U. S. v. *Rogers*, 255 U. S. 163;
U. S. v. *Benedict*, 280 Fed. 76;
Prince Line v. *U. S.*, 283 U. S. 535;
Nat. Lab. & Supp. Co. v. *U. S.*, 275 Fed. 218;
20 Corpus Juris 807.

ARGUMENT

The final judgment of the Circuit Court of Appeals in this case was to remand the case to the District Court with instructions to render a judgment in the flat sum of $6,000, the value on May 23, 1919, of the lands appropriated, as found by the jury under the special issue framed by the District Court. In short, the effect of the judgment as thus reversed and reformed by the Circuit Court of Appeals is to hold that the property owner is not entitled under the Constitution as made effective under the procedure for the determination and payment of just compensation provided by section 10 of the Lever Act to any allowance or recovery, under any circumstances, in excess of the flat value of the property of the date of its appropriation. The premise on which this conclusion was based is, we submit, entirely too narrow. The Circuit Court of Appeals ignores the real nature of the proceeding, that is, a proceeding for the ascertainment and rendition of just compensation in all of its aspects, without which the seizure would have been unlawful, and regards the allowance by the trial court of *compensation* in terms of interest merely as an unwarranted allowance of interest *qua* interest on a "claim against the United States," supposedly in violation of the traditional immunity of the government from the payment of interest except in pursuance of statute or express undertaking.

In pursuance of this impression, the Circuit Court of Appeals interprets the jury finding of $6,000 as a *verdict* by the jury of the entire amount of compensation due the owner, to which it conceives that the trial court erroneously added interest; whereas, to meet the suggestion on the same narrow basis, the finding of the jury and judgment of the District Court are not properly subject to that analysis. Thus asserts the Court of Appeals (majority opinion, Record, p. 15):

> "Issue being joined, on plaintiff's motion, a jury was impaneled to ascertain what would constitute just compensation for the property taken * * *

That this was not the precise issue is made clear by that Court's immediate recital of the fact that

> "and on the 5th of May, 1920, a verdict was returned, awarding to the plaintiff six thousand dollars, *the value as of the date of the taking of the property*" (Record, p. 15; 280 Fed. at p. 351);

and by the entire record from which it clearly appears that the only issue considered by the jury was the fair and reasonable value of the property on May 23, 1919 (Record, pp. 6–9).

The confusion doubtless arises out of the fact that the parties, on November 17, 1920, when the jury issue was made up under the doctrine of the *Filbin Corporation Case* (Record, p. 6; 265 Fed. 354) and on May 5, 1921, when the case was tried, informally (and perhaps erroneously—although without any possible prejudice on this record—in view of the subsequent decision in *U. S.* v. *Pfitsch*, 256 U. S. 547), permitted the question of the value of the land on May 23, 1919, to be submitted to the jury as the sole issue for its particular consideration, rather than all elements and aspects of compensation, such as that reflected in the allowance of interest or the equivalent of interest. Any informality in that particular was accepted by the parties, for no exception is to be found in the record and the fundamental question presented by this appeal need not be obscured by considerations as to the province of the jury, which as we have shown, was by the court treated as advisory or supplementary in this case and in *Filbin Corporation* v. *U. S.*, *supra*, either with the assent or upon the insistence of

the United States.* There could seem to be no reversible error, in any event, where the court itself adds interest as a necessary measure or element of compensation in cases where it would in any case peremptorily charge the jury to that end. LEWIS, Eminent Domain (3rd Ed.), Section 742, at p. 1324.

The effect of the judgment in this case is, accordingly, that, aided by an advisory or special finding of a jury as to one element of compensation, viz. the value of the land on the date of requisition, the total just compensation to which the Seaboard is entitled by virtue of the appropriation has, after full hearing of all the testimony, been found to be the naked land value on May 23, 1919, *plus* a sum equal to the South Carolina rate of interest from that date. The testimony was not set out by the Government in the record on which it appealed to the Circuit Court of Appeals, on which this case is also, necessarily, submitted. If, accordingly, anything may, under any conditions or state of proof, be added to the naked land value, by court or jury, in ascertaining and awarding just compensation under the Constitution, as that term is adopted by Section 10 of the Lever Act, the amount added by the trial court in this proceeding measured by or in terms of interest, or denominated as interest, must be conclusively presumed to be within the scope of the testimony, if, indeed, that measure is not within the judicial knowledge of the court as an appro-

*Until the decision in *U. S.* v. *Pfitsch, supra*, it was undoubtedly the contention of the Government that trials under section 10 of the Lever Act were before the Court sitting without a jury as a court of claims under section 20 (24) of the Judicial Code. That position was affirmatively asserted by the Government in *U. S.* v. *McGrane*, 270 Fed. 761, decided Feb. 8, 1921, and was necessarily implied in the direct writ of error from the Supreme Court to the District Court unsuccessfully sought by the Government in *U. S.* v. *Pfitsch*. And the general preference of the Government for trials by the court, without a jury, is illustrated by the agreement in the *Benedict Case*, 280 Fed. 76, 270 Fed. 267.

priate element or measure of compensation. See authorities cited, *infra.*

Before discussing the specific theory on which the trial court held that interest, or an amount equivalent to interest, was allowable as an element of compensation (viz. *U. S.* v. *Rogers,* 255 U. S. 163), it will be well to point out what we conceive to be the salient errors in the theory on which the Circuit Court of Appeals excluded the additional element thus ascertained and allowed by the trial court.

It might be conceded that the contract, or the major part of the contract heretofore discussed in the decisions, on part of the United States implied from the authorized seizure for national use of admittedly privately owned property is to pay the naked value of the property at the time of the seizure, and that such implied contracts of the United States carry no obligation to pay *interest* as such accruing on the base amount prior to the constitutional ascertainment or tender of the amount due. An implied contract of this nature, limited as thus stated and accompanied as it is by the restrictions affecting the enforcement of implied contracts under the Tucker Act, such as the express provision against the allowance of interest, may or may not constitute an adequate procedure in any particular case, for the reasonably prompt, certain, and unhampered ascertainment and payment of compensation in all of its constitutional elements for the seizure, having in mind the nature and character of the property taken or the easements imposed upon or carved out of it, which is necessary to remove any given appropriation of private property from conflict with the Fifth Amendment. The procedure indispensable to that result is pointed out by the authorities cited under Proposition II, *supra.* A clear illustration of the inadequacy in particular cases of the "implied contract" and the Tucker Act will be instanced at a later point in this brief.

If such restrictions, whether based on an obsolete notion of sovereignty and of impeccability from fault or delay erroneously supposed to inhere in the Governmental mechanism or upon the selfish doctrine of convenience, restrict the procedure provided by Congress in any case of appropriation of private property for public use in such wise as to exclude from consideration in the indispensable fair hearing and provision for compensation, adapted to the nature and character of the deprivation, which must accompany every lawful seizure, any just or proper element of that just compensation—that full and perfect equivalent (*Monongahela Case*, 148 U. S. 312)—to which the owner is entitled, the restrictions are invalid as in the *Monongahela Case* or else the appropriation itself is unlawful and subject to resistance by the citizen as an ordinary trespass.

Bearing in mind this situation, the exclusive procedure established by section 10 of the Lever Act assumes a synthesis and significance which is wholly missed by the opinion of the Circuit Court of Appeals. That court regards this proceeding as an ordinary suit by the Seaboard on a "claim" against the United States, subject to all of the traditional notions and limitations affecting suits against the United States, among which is thought to be the immunity of the United States from liability for interest, in any form, in this proceeding, regardless of "what may be said as to the injustice of its position" and as a condition "necessarily arising in dealing with the Sovereign" (Record, p. 18, 280 Fed. at p. 352). That conclusion is based upon the erroneous conception entertained by the Circuit Court of Appeals to the effect that

> "the present case is in no sense a condemnation proceeding * * * Such action is but a plain and simple suit at law, to recover from the government *upon an implied contract* to pay for property lawfully taken, but not paid for." (Record, p. 20; 280 Fed. at p. 354.)

There exists not the slightest basis or necessity for designating this proceeding as an action upon an implied contract. The action is under and on the statute. The statute itself is a direct and necessary reaction to the Constitutional requirement that *a proceeding* must be made available to the owner for the prompt ascertainment and payment of *full compensation* or else the appropriation and ouster of the owners in advance of compensation is illegal. Under these conditions and in the face of this necessity it is vain to suggest that the principles governing the ascertainment of compensation and damage (compensation for the property taken and damages in terms of impaired value to the estate out of which the taking is carved or for the value of the use of his property from the time of ouster until the time of payment) due the owner must be regarded as responsive, not to the principle of just compensation under the Constitution, but, as contended by the Circuit Court of Appeals, to some common law policy as, for instance, the immunity of the government from interest. This and like restrictions upon the right of suit are frequently based on ancient paradoxes, such as the fallacy that the government is always presumed to be ready to pay what it owes (*U. S.* v. *Sherman*, 98 U. S. 565, 568; *U. S.* v. *North Carolina*, 136 U. S. 211, 217) which are valid, when tested in proceedings where the "just compensation" clause of the Fifth Amendment is involved, only so long as they do not as a matter of fact run counter to the Fifth Amendment or force a result having that effect. Were it otherwise, the Government could undermine the Constitution with sophistries.

In accounting to the owner for private property lawfully appropriated to public use, the Government is not dealing with a subject matter as to which it has any discretion—as it has in the case of suits on ordinary claims or on any claims not involving a taking of private prop-

erty. In cases involving an appropriation of property the Government must either pay, or consent to be effectively sued for, all elements constituting just compensation at the time the diligent property owner gets the compensation or it must refrain from the appropriation of the property in advance of payment. It has no discretion in the matter. The right of the owner to *full compensation* is absolute and cannot be made subject to contingencies, uncertainties or conditions. *Nichols*, Eminent Domain, Section 206, 215. The Government can not discharge its obligation to make full payment by forcing on the owner some substitute for money. *Nichols*, Eminent Domain, Section 205; *Lewis* (3rd ed.), Section 682; *Dillon*, Munic. Corp. (4th ed.), Section 1048; *Sutherland*, Damages, Section 1066. It can not pay the owner in "rights" (*State* v. *Kings County Court*, 77 Wash. 593, 615, 138 Pac. 272), or in doubtful and illusory or intangible privileges "reserved" to the owner (*Brack* v. *Baltimore*, 125 Md. 378, 93 Atl. 994, Ann. Cas. 1916–E, 880) or "future obligations, bonds, or other valuable advantage" (*Butler* v. *Sewer Commissioners*, 39 N. J. L. 665; *Bloodgood* v. *M. & H. R. Co.*, 18 Wend. 9, 35, 31 Am. Dec. 313; *Sanborn* v. *Belden*, 51 Cal. 266; *Burlington* v. *C. R. Co.* v. *Schweikart*, 10 Colo. 178, 14 Pac. 329, cited in *City of Waterbury* v. *Platt Bros. & Co.*, 76 Conn. 435, 440; 56 Atl. 856, 858). Obviously it can not offer a promise to pay, *substantially later*, as the exact and perfect equivalent of an obligation under the Constitution to pay at the time of the seizure.

It is obvious that the Government can not indirectly fix the price of compensation it shall pay for appropriated property below the Constitutional measure by impairing through construction or judicial policy what appears, *prima facie*, to be a full measure, or by otherwise withholding an adequate remedy, or by establishing as the sole remedy (such as is Section 10 of the Lever Act)

a proceeding falling short in some tangible and substantial respect in making provision for compensation in the full sense of that term.*

The Circuit Court of Appeals does not discuss the question from the standpoint of compensation, which is the fundamental aspect of the question and which furnishes the sole basis for the enactment of Section 10 of the Lever Act as well as the sole test for its validity. Proceedings under that statute (Section 10) are "compensation" proceedings pure and simple, not as upon an express or implied contract. They stand upon the direct authority of that Act which, to be valid and to relieve the seizure of the necessity of being denounced as illegal, must be interpreted as being free from any conditions or limitations which would restrict the court short of an award of full compensation.

We submit that the basis for the action of the trial court and the general reasoning of the dissenting opinion of Judge Woods (Record, pp. 24–5; 280 Fed. at p. 357) is sound and unanswerable, to the effect that

> "any proceeding prescribed or authorized by a state or the federal Legislature to acquire land for public purposes and to ascertain just compensation for it is a condemnation proceeding, and every step taken in it from the beginning to the end is a part of the condemnation. It may be a suit by the Government before taking without other proceeding, as *Kohl* v. *United States*, 91 U. S. 367, 376. In *Garrison* v. *United States*, 21 Wall, 196, at page 204, the court says:
>
> "The proceedings to ascertain the benefits or losses which will accrue to the owner of property when taken for public use, and thus the compensation to be made to him, is in the nature of an inquest on the part of the State, and is necessarily under her control. It is her duty to see that the estimates made are just, not merely to the individual whose property is taken, but to the public which is to pay for it."

*Right and remedy are reciprocal. To deny the remedy is, in substance, to deny the right. 1 CORPUS JURIS 985, notes 28 and 29.

"In *Kennebec Water Dist.* v. *Waterville*, 96 Me. 236; 52 Atl. 774–789, condemnation is defined to be:

"a special proceeding, provided and authorized by the sovereign power by whose authority the property is taken, to determine a specific fact. The proceedings are in the nature of an inquisition on the part of the State."

"See, also, *Filbin Corporation* v. *United States*, 265 Fed. 354.

"The title does not vest in the Government until the just compensation has been ascertained on a fair hearing and actually paid. *Garrison* v. *United States, supra.** It seems to me perfectly clear that the taking and method of ascertainment of value and payment prescribed by Section 10 is a condemnation proceeding instituted by the Government. The Congress has in one section prescribed an exclusive and complete scheme of condemnation to be instituted by the Government. Each successive step prescribed by the statute—the taking, the tentative ascertainment of value, the payment of seventy-five per centum of such valuation, the suit by a dissatisfied land owner —is a part of one condemnation proceeding instituted by the United States."

And note the soundly reasoned observations by the learned trial judge made in the *Filbin Case*, 265 Fed. at pp. 357, 358, including the following:

"The Constitution has expressed that the exercise of this power by the legislative department can be only upon condition of the payment of just compensation. There are two acts involved in the exercise of the power: One is the taking possession of the property; and the other is the compensation to be paid for the same. No matter what may be the guise or form or

*We shall point out, *infra*, that the statute authorizing the appropriation may, indeed, expressly provide that title shall pass at the time of the appropriation or seizure and without awaiting actual payment; but the general rule is as stated by Judge Woods and it can be departed from only when full compensation in all of its elements is assured—loss of the use of the property or its equivalent being one of those elements. See discussion, *infra*.

language in which this taking may be phrased or determined, it all ultimately comes from the same power, and is in effect a condemnation for the taking of private property for public use, whether it be termed a condemnation or a requisition or any other name. The determination of the amount of compensation to be paid, being a matter under the Constitution reserved as a controversy existing between the public and the individual, in which in the first instance the public is the actor by the mere taking of the property, has been decided by the Supreme Court of the United States to be akin in all respects to a suit at common law. *Kohl* v. *U. S.* 91 U. S. 367 * * *

"The taking and the method to ascertain the compensation are a part of the process of condemnation, being a particular method of condemnation provided by the Legislature under the exigencies of the case. The proceeding is in reality begun by the requisition. The application to have the compensation fixed is a part of that proceeding, necessarily subsequent, as depending upon the fact whether or not the owner of the property might agree to the sum fixed by the President as just compensation. If he so accepted it, there was no necessity for any further proceeding. If he were dissatisfied with it, then the expression of his dissatisfaction, and the means taken to have it determined, were all a part of the condemnation as a whole.

"This proceeding, under section 10, is not an original suit against the United States, to institute which needed express legislative permission. It is a part of the proceeding for condemnation originally instituted by the United States itself, and in which the United States is the actor; this being only the defensive answer of the property holder to assert his right to just compensation. No other interpretation consistent with the Constitution appears a reasonable one."

We have endeavored to establish by the foregoing observations and references the essential difference in

theory and in fact btween a plenary statute making direct and exclusive provision for the ascertainment and payment of just compensation in all of its elements and aspects, without limitation (and, *ex hypothesi*, expressly or by necessary implication rising superior to any mere rule of practice in conflict with the fundamental purpose of the act or with the condition prerequisite to its validity) and general remedies accepted by the property owner *cum onere* (such as an implied contract enforceable under and subject to any limitations of the Tucker Act and any limitations on the jurisdiction conferred on the Court of Claims) which may or may not make adequate provision for just compensation according to the circumstances of the particular case and according as such general remedies may be construed by this Court as embracing or not embracing every tangible and substantial element of just compensation.

What seems to us an inevitable conclusion is that Section 10 of the Lever Act falls in the first class, that is, the class of direct, plenary, and unlimited provisions. It is in no sense essential to a recovery of just compensation in such cases that the proceeding rest upon an implied contract. It may well be that the necessity for a direct and plenary statute is due to the fact there is no implied contract, as was the situation when the Federal Infringement Act (June 25, 1910, 36 Stat. ch. 423, p. 851) construed in *Crozier* v. *Krupp*, 224 U. S. 290, and in *William Cramp & Sons Co.* v. *Curtis Turbine Co.*, 246 U. S. 28, was extended to authorize the recovery of just compensation from the United States for the use of patents asserted, though erroneously, under claim of right by the United States and under circumstances which necessarily exclude the notion of an implied contract, on the familiar principle pointed out in *Schillinger* v. *U. S.*, 155 U. S. 163; *U. S.* v. *Berdan Fire Arms Co.*, 156 U. S. 552, etc. In the *Crozier Case* the court said of the statute, after quoting the provision of the Act to the effect that whenever an

invention described and covered by a patent of the United States "shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims," italics supplied:

> "That is to say, it adds to the right to sue the United States in the Court of Claims already conferred when contract relations exist the right to sue *even although no element of contract is present* * * *
>
> "In substance, therefore, in this case, in view of the public nature of the subjects with which the patents in question are concerned and the undoubted authority of the United States as to such subjects to exert the power of eminent domain, the statute, *looking at the substance of things*, provides for the appropriation of a license to use the inventions, the appropriation thus made being sanctioned by the means of compensation for which the statute provides." (p. 304, 305).

These considerations have been plainly overlooked in the opinion of the Circuit Court of Appeals, which has ignored the organic nature of the proceeding, and the freedom of the statute from any limitation whatever which would bring it into conflict with the Fifth Amendment. Without admitting that any implied contract arising from the seizure would not carry the implication of agreement by the United States to make full compensation of all elements of compensation and damage contemplated by the Fifth Amendment, it is sufficient to observe that this proceeding is not an action on an implied contract. It is an integral and necessary step in a plenary and exclusive proceeding set up by the statute for the ascertainment and rendition of full compensation in all of its elements.

DISTINCTION BETWEEN ACTION OR PROCEEDING UNDER A PLENARY STATUTE PROVIDING FOR THE APPROPRIATION OF PRIVATE PROPERTY AND FOR THE JUDICIAL ASCERTAINMENT OF FULL COMPENSATION TO THE OWNER, AND SUIT UNDER THE TUCKER ACT ON AN IMPLIED CONTRACT SUBJECT TO THE LIMITATIONS OF SECTION 177 OF THE JUDICIAL CODE, ETC.

As heretofore pointed out, the lawful appropriation of private property under the Constitution must be accompanied by the existence or assurance of reasonably prompt, certain, and adequate provisions for the determination and payment of just compensation. Authorities cited Proposition II, *supra*.

This prerequisite is something afforded by specific and plenary statutes which authorize the seizure and at the same time set up direct and exclusive provisions for the ascertainment and payment of compensation. In this group is Section 10 of the Lever Act. Under this section the process for the determination of compensation is, primarily, a tentative determination by the President, subject to appeal by the property owner from that determination to the District Courts. No one supposes that the decision of the President could be made final in such wise as to deny the owner full recourse for a judicial test of the sufficiency of the award. Since the only limitation upon the District Court is the admonition not to stop short of "just compensation," it is obvious that the requirements of the due process and compensation clauses of the Fifth Amendment are fulfilled, there being nothing in the nature of the property or of the easement sought to be impressed upon the Seaboard's ownership, to require extraordinary remedies, and there being no statute (such as Section 177 of the Judicial Code, if, indeed, any such statute would have any bearing whatever on the matter, as we shall point out) or rule of decision conflicting with the right of the property owner under Section 10 to full compensation in all of its elements.

In other cases the appropriation is authorized, with no express provision or assurance of compensation. In such cases the validity of the seizure is dependent upon the question whether the implied contract of the Government, actionable under and subject to the limitations of the Tucker Act and of the Court of Claims or appropriate District Court sitting as a Court of Claims, afford a reasonably prompt, certain, and adequate process for the ascertainment and payment of full compensation, having in mind the nature and character of the property and the easement or servitude sought to be imposed. If it does not meet these requirements, the property owner has the alternative of resisting the inadequately compensated invasion of his property rights thus set in motion in violation of the Constitution, or of yielding to the appropriation, waiving its illegality which is personal to owner, and taking the inadequate compensation afforded by suit under the Tucker Act on the implied contract. Of course, if the property owner follows this course and brings suit on the implied contract under the Tucker Act and that recourse happens in the particular case to afford something less than the full measure of damages contemplated by the Constitution, the claimant can not expand the remedy on that account by urging that Section 177 of the Judicial Code be ignored or that the judicial processes of the Court of Claims be stretched beyond their statutory scope. The owner's remedy was to resist the seizure.*

*A clear illustration of inadequate provision for compensation (resting solely under the implied contract to make compensation arising out of the seizure) is found in the seizure of the railroads by the President under the Federal Possession and Control Act of August 29, 1916 (39 Stat. L. 645), for an indefinite and incalculable term, subject to servitudes which might destroy the properties, under conditions (such as the location of the equipment in varying and indeterminate physical condition scattered over 400,000 miles of railway and much of it moving at high speed at the time of seizure and relinquishment) which made the determination of physical condition at the time of

At a later point in this brief—under our discussion of the question of just compensation for a seizure of land in advance of the award or payment of compensation we will, in passing, point out what we conceive to be plain reasons why the "implied contract" of the Government actionable under the Tucker Act should be construed as contemplating the payment of full compensation for the owner's property loss, whether regarded as for the value of the use lost to the owner pending the rendition of basic compensation, or for use and occupation or otherwise. That inquiry, however, is not directly or necessarily involved in this proceeding.

The sole question in this case is whether the owner is entitled to recover *anything* in addition to the bare value of the land reckoned as of the date of the appropriation, by way of compensation for the property or its equivalent or its lost use for the period during which the owner has neither had use of the property nor received or had the

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seizure and relinquishment incapable of judicial ascertainment. The only provision for compensating the owners for this extraordinary action, characterized by the succeeding Executive in his message to Congress at the beginning of the current session of Congress as an act of supreme folly, in which the President in seizing the railroads sought to minimize the consequences of the accomplished seizure by purporting in his proclamation to reserve the privilege of turning back the property to the owner at some unknown time in the future, in unknown condition, with the scars of Federal operations and policies upon it (a recourse plainly incompetent to the Government under the principle announced in *State* v. *Kings County Court*, 77 Wash. 593 (615), 138 Pac. 272; *Jackson* v. *New York*, 213 N. Y. 34, L. R. A. 1915-D, 492-4-5; *Brack* v. *Baltimore*, 125 Md. 378, 93 Atl. 991, Ann. Cas. 1916-E, 880; *L. & N. R. R. Co.* v. *W. U. T. Co.*, 184 Ind. 531, 111 N. E. 802, Ann. Cas. 1917-C, p. 629; *Waterbury* v. *Platt Bros. & Co.*, 75 Conn. 387, 60 L. R. A. 211 (218); *Butler* v. *Sewer Commissioners*, 39 N. J. L. 665; *Bloodgood* v. *M. & H. R. Co.*, 18 Wend. 9, 35, 31 Am. Dec. 313; *Sanborn* v. *Belden*, 51 Cal. 266; *Burlington & C. R. Co.* v. *Schweikert*, 10 Colo. 178, 14 Pac. 329; *City of Waterbury* v. *Platt Bros. & Co.*, 76 Conn. 435, 440, 56 Atl. 856 (858); *Nichols*, Eminent Domain, Sections 205, 206, 215; *Lewis* (3rd ed.) Section 682; *Dillon*, Municipal Corporations (4th ed.) Section 1048; Sutherland, damages, Section 1066—was, at the time of the seizure, the "implied contract" of the Government, carrying the right to bring a multiplicity of suits

use of its equivalent in terms of compensation for its value. If the owner is entitled to an award of *anything* in addition to bare land value, reckoned as of the date of seizure, the judgment of the District Court should be affirmed, for the allowance of interest or an allowance in the nature of or measured by interest, must be conclusively presumed to be (a) within the scope of the evidence; (b) or within the scope of this Court's judicial knowledge of the fair and common sense equivalent applicable; (c) or sustained by the President's finding and admission made in this proceeding that an allowance in the nature of interest was and is an element of compensation.

WHERE PROPERTY IS APPROPRIATED BY THE GOVERNMENT AND THE OWNER IS OUSTED FROM POSSESSION AND AFFORDED NO EQUIVALENT PENDING THE AWARD OR TENDER OF COMPENSATION LIMITED TO THE BARE VALUE OF THE PROPERTY SEIZED, THERE IS AN UNCOMPENSATED OR INADEQUATELY COMPENSATED TAKING IN VIOLATION OF THE FIFTH AMENDMENT.

"There can, in view of the combination of those two words (just compensation) be no doubt that the compensation must be a full and perfect equivalent for the property taken" *Monongahela Case*, 148 U. S. at p. 326. The Fifth Amendment stands "as a declaration that no

in the Court of Claims, in which the uncertainty of the term, of the servitude, and of the compensation and damage involved, made that remedy wholly illusory. The result was that either the reserved proposal to return the property was void and the seizure final (for lack of any adequate provision for compensation based on a temporary use, which might last for a day or might last forever), or else the seizure was illegal and in colossal violation of the Fifth Amendment. Whether these consequences were remedied by the Federal Control Act of March 21, 1918 (40 Stat. L. 451), is a question the discussion of which would not illustrate our point; viz, that an action on the implied contract resulting from the seizure of private property is by no means *semper ubique et ab omnibus* to be regarded as providing adequate compensation within the meaning of the Fifth Amendment, having due regard for the nature and character of the property and of the taking.

private property shall be appropriated for public uses unless a full and exact equivalent for it be returned to the owner" (*ib*).

The Fifth Amendment is to be construed liberally in favor of the citizens, it being "the duty of the Courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd* v. *U. S.*, 116 U. S. 616, 635, quoted in the *Monongahela Case,* 148 U. S. at p. 325.

The "full and perfect equivalent" of property worth $6,000 seized on May 23, 1919, is not awarded by a tender to the owner of $6,000 on May 9, 1921. Nor is it the "full and exact" equivalent. That conclusion ought not to be debatable. "Having taken the lands it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property. *Monongahela Navigation Company* v. *United States,* 148 U. S. 312, 341"—*United States* v. *Rogers,* 255 U. S. 163, at p. 169.

That the allowance of interest or of a sum equivalent to interest on the bare value of the property seized, from the date of seizure to the date of payment, is allowable in proceeding for the ascertainment of the compensation due the owner for property appropriated has been repeatedly asserted:

U. S. v. *Rogers,* 255 U. S. 163, affirming 257 Fed. 397.

U. S. v. *Highsmith,* 255 U. S. 170, affirming 257 Fed. 401.

U. S. v. *First National Bank.,* 250 Fed. 299. 15 Cyc. pp. 930, 931; and 10 R. C. L. p. 163, cited in *U. S.* v. *North American Co.,* 253 U. S. 330.*

*The opinion in this case also cites as expository of "the theory on which interest *should be allowed in compensation proceedings*": *Moll* v. *Sanitary Dist.,* 228 Ill. 633, 636; *Lake Roen, etc., Co.* v. *McLain Co.,* 69 Kan. 334, 341-342; *Kidder* v. *Oxford,* 116 Mass. 165; *Hamersley* v. *New York City,* 56 N. Y. 533, 537; *Sioux City R. R. Co.* v. *Brown,* 13 Nebr. 317, 319; *Atlantic & Great Western Ry. Co.* v. *Koblentz,* 21 Ohio St. 334, 338.

The rule is thus asserted by LEWIS, Eminent Domain (3rd Ed.), Section 742, p. 1319 et seq.:

"In the absence of any statutory provisions controling the subject, the rules in respect to interest must be derived from the constitutional provision requiring just compensation to be made for property taken. Where damages are assessed for property which has already been lawfully appropriated to public use, interest should be allowed from the time of the appropriation, or entry on the property."

And see also the principal case and the annotation to *Watson* v. *Jersey City*, 84 N. J. L. 422, in L. R. A. 1916C, at p. 1110, supplementing the annotation in 28 L. R. A. (N. S.) 1, with full citation of authorities. The annotation states:

> "In 15 CYC. 39, it is said: 'Just compensation, to be ascertained by an impartial tribunal, is a constitutional right of the owner of property taken under the power of eminent domain.' It is because of this right that interest has generally been allowed in eminent domain proceedings."

And, also, on p. 1112:

> "In regard to the right to interest, the court in a New York case (*People ex rel. Central Trust Co.* v. *Stillings* (1910) 136 App. Div. 438, 121 N. Y. Supp. 13, affirmed without opinion in (1910) 198 N. Y. 504, 92 N. E. 1096) on facts, however, not within the scope of the note, said: 'The theory of the law of condemnation is that payment for the land taken shall be coincident with the taking; and if for any reason payment is postponed, the right to interest from the time payment ought to have been made follows as a matter of strict constitutional right.' And the supreme court of Kansas (*Lake Roen Nav. Reservoir & Irrig. Co.* v. *McLain Land & Invest. Co.* (1904) 69 Kan. 334, 76 Pac. 853) has laid down an apparently sound rule in regard to the right to interest in eminent domain proceedings, as follows: 'In condemnation appeals

the issue is, What shall be full compensation? Interest is allowed merely as a means of securing such compensation.'

"Therefore, it appears that one whose property is taken under eminent domain is entitled to interest on the damages assessed *whenever just compensation would not otherwise be accorded him.*"

In addition to the case at bar we find that a similar allowance of, or measured by, interest has been made in the following cases in proceedings under Section 10 of the Lever Act on the theory that such proceedings are in substance and effect compensation or condemnation proceedings, and that the allowance is *compensation:*

U. S. v. *Benedict*, (C. C. A. 2nd Circuit) 280 Fed. 76 (80), Judges Hough, Manton, and Mayer;

Prince Line v. *U. S.*, 283 Fed. 535;

and also by the District Court of the United States for the Southern District of New York in *Pfitsch* v. *U. S.*, in which the direct appeal to this court by the United States solely because of the allowance of interest was dismissed for want of jurisdiction, as sufficiently appears from the opinion of the Court in *U. S.* v. *Pfitsch*, 256 U. S. at p. 549.

Under proceedings involving the question of compensation a similar allowance was made in *National Laboratory & Supply Co.* v. *U. S.*, 275 Fed. 218, in a case in which the emergency seizure of property, resulting in a proceeding by the property owner to recover compensation in the District Court was recognized as "a feigned issue to determine 'just compensation'."

A sound reason sustaining the allowance of interest as a measure of compensation, given in the dissenting opinion of Judge Woods in this case, is based upon the general proposition that, in the absence of specific statutory provisions to that end, to be discussed later, *title does not vest* in the Government until the just com-

pensation has been ascertained on a fair hearing and actually paid. (Record, p. 25, 280 Fed. at p. 357.) In addition to the authority cited by Judge Woods on this point (*Garrison* v. *U. S.*, 21 Wall. 196, 204) see text and authorities cited in 20 Corpus Juris 844. In cases of that nature (where title is not divested *in limine*) and where the Government nevertheless takes possession, there is a dual taking directly and technically involved and the compensation necessary to be made to comply with the Fifth Amendment falls under familiar categories: (a) compensation for use and occupation pending the acquisition of title and (b) compensation for the land itself, when the title finally passes to the Government, that is, after the ascertainment and payment of just compensation.

Where, by express provision of the statute, the title is sought to be divested at the time of the ouster of the owner, and in advance of the ascertainment and rendition of compensation, the rights of the owner under the Fifth Amendment can not be substantially different. It would be absurd to contend that the right of the owner under the Fifth Amendment is *less advantageous* where he is technically divested of title as well as of possession and enjoyment than where he is merely divested of possession and enjoyment and is left with the naked title. We do not, accordingly, stop to press the analysis of Section 10 of the Lever Act to determine when title passed under this requisition or condemnation. The general rule is stated in the margin (*). It is certain that the ouster of

*The general rule is that title does not pass in the case of appropriation to public use until the compensation or damages are paid, "except where the statute expressly provides that title shall pass before compensation and makes adequate and certain provision for such compensation." See, 20 Corp. Jur. 844; *Bauman* v. *Ross*, 167 U. S. 548 (599) to the effect that: " . . . the damages not having been paid, the title in the land has never passed;" and *Cherokee Nation* v. *Kansas Ry. Co.*, 135 U. S. 641, 659, stating that:

the Seaboard was illegal, whether title is supposed to pass *in limine* or not, unless Section 10 of the Lever Act be construed as providing for every just element of compensation, including the value of the use of the property or its equivalent from the time of the ouster of the owner.

It may be contended that the value of the use of the property lost to the owner, pending acquisition of title by the United States, is not, as a matter of law, equivalent to the value of the use of its money equivalent, that is, to interest on the money value of the property at the time of appropriation. It is conceivable that if title did not pass at the time of the seizure (under what must be declared to be the unconditional assurance of every element of just compensation held out by Section 10 of the Lever Act) the value of the use (use and occupation) pending passing of title might be greater than an *interest rental* (Cf. *Nahhas* v. *Browning*, 183 Pac. 442, 6 A. L. R. 476). So far as this record is concerned the judgment of the trial court is conclusive. If it be assumed that title technically passed to the Government

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"Within the meaning of the Constitution, the property, although entered upon pending the appeals, is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner. Such was the decision in *Kennedy* v. *Indianapolis*, 103 U. S. 599, 604, where the court . . . said that " . . . the title does not pass from the owner without his consent until just compensation has been made to him. In the case now before us, the property in respect to which the referees made the award will be conditionally appropriated for the public use when the defendant makes a deposit. . . . But the title has not passed, and will not pass, until the plaintiff receives the compensation ultimately fixed by the trial *de novo* provided for in the statute."

And, as stated above, we do not mean to suggest that the statute authorizing condemnation may not expressly provide for the passing of title *in limine* upon the making of enforceable assurances of full compensation, equivalent in themselves to a tender. *Sweet* v. *Rechel*, 159 U. S. 380; and other authorities cited, Proposition II.

contemporaneously with its unconditional seizure, it is difficult to understand how there can be any other value of the use of land thus definitely appropriated by the Government other than the lost use of its money equivalent, the ultimate payment of which has been effectively substituted for the title. And such has been the intensely practical and common sense conclusion of this Court, wholly without reference to any question of conformity to state practice in condemnation cases.

Thus, in the *Rogers Case* (*U. S.* v. *Rogers*, 225 U. S. 163) the court said, italics supplied:

> "The Government urges that the Conformity Act of August 1, 1888, does not require the United States Government to be bound by the rule of the State statute in the allowance of interest. This may be true, *but we agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled.* The fact that the rule is in harmony with the policy of the State where the lands are situated does not militate against but makes for the justice and propriety of its adoption. *United States* v. *Sargent, supra.*" *

U. S. *v.* NORTH AMERICAN TRANSPORTATION CO.

There is, we submit, nothing whatever in *U. S.* v. *North American Transportation Co.*, 253 U. S. 330, which militates in the slightest degree against the allowance of a sum equal to the applicable rate of interest as part of the compensation to which the landowner is entitled on this record. On the contrary that case is direct and eminently satisfactory authority for the position we take. We believe that conclusion to be capable of precise demonstration.

*In attempting to avoid the effect of this unequivocal expression, the majority opinion of the Circuit Court of Appeals (Record, p. 20, 280 Fed. at p. 354), referring to the *Rogers Case* nevertheless insists that "the vital point in that case was that there was a State statute allowing interest." This Court expressly repudiated that notion.

The action involved in that case was not under a plenary statute requiring the Court of Claims to ascertain and award full compensation. It was a suit under the Tucker Act, *on an implied contract*, accepted by the owner and initiated by him subject to the express limitation of Section 177 of the Judicial Code prohibiting the allowance of interest as such.

The property in question was unlawfully seized by an army officer without authority from Congress or from the Secretary of War, who alone had primary authority in the premises. During the time of this unlawful occupancy, the owner had no right of action under the Tucker Act on an implied contract for this unlawful and tortious invasion of his property. His only remedy during that status of the matter was to resist the invasion by injunction or by suit against the individual trespassers.

Subsequently, the Secretary of War announced the tract as a public reservation, and the property was thereafter used continuously as an army post, thus giving rise to a cause of action on an implied contract on part of the Government in favor of the owner "to pay the value of property as of the date of the taking" (253 U. S. at p. 335), and subject to the express statutory disclaimer by the United States of any liability for interest, *as such*, resting in Section 177 of the Judicial Code (*id.*, p. 336).

Whether this remedy, thus limited, constituted in that particular case that adequate provision for the prompt ascertainment and payment of all elements of compensation, such, for instance, as the value of the land and also for the value of the use of the land during the period necessarily elapsing between the ascertainment and payment or tender of compensation, and the consequent satisfaction of the Fifth Amendment by the United States, was not involved or decided in the *North American Co. Case*, and has not been raised or decided in any other

comparable case. The owner did not resist the appropriation. It accepted the sole remedy and relationship offered it under the general statutes and decisions—viz, suit on an implied contract—and necessarily took the burden of the limitations attaching to that form of action and that remedy, if any.

Such being the action in that case, the plaintiff was held not to be entitled to recover for use and occupation ensuing after the taking for, as stated by the Court, the contract implied under the decisions cited was "to pay the value of property as of the date of the taking" (*ubi sup.*); and "a plaintiff suing in contract can recover only on a cause of action existing at the time the suit was brought" (*id.*, pp. 337–8). This seems somewhat finely drawn. Recoverable damages for breach of contract frequently accrue after suit on the contract has been filed. There seems to be no reason why the implied contract which arises out of the circumstances of a seizure in advance of the ascertainment and payment or tender of just compensation should not include an implied undertaking to pay the value of the use and occupation *necessarily elapsing* prior to the final investiture of title in the Government under the Constitution, or prior to the ascertainment and payment of compensation, as well as every justly conceivable element or measure of just compensation. The point was not raised in the *North American Company Case* and has not been directly mooted or decided by the Court so far as we have been able to discover. To hold that the "implied contract" stops short of full compensation may cast grave doubts upon the adequacy of that remedy. The point is not necessary to be considered on this record.*

*If the quoted expressions or the opinion in the *North American Company Case* go further than to assert that the claimant in that proceeding had not qualified itself on the record before the Supreme Court to any compensation except the bare value of the land on the date of seizure, we respectfully sub-

A further conclusive, though technical, reason why the plaintiff in the *North American Co. Case* was held not to be entitled to recover a sum equivalent to interest as compensation for the value of the use of the property pending the ascertainment and award of compensation or final divestiture of title was that, although the petition claimed an allowance for use and occupancy, the petitioner did not, so far as appeared from the record on that appeal

> "make any request of any kind in the court below in respect to an allowance for use and occupation. The court does not mention the subject in the opinion; and it is not referred to in the application for an appeal" (253 U. S. at p. 338).

Under the practice prevailing in the Court of Claims the absence of any finding or request for finding or exception in relation to the matter reduced the question on the record to a bare question of interest, as such, the right to recover which was repudiated by statute at the thresh-

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mit that it was *obiter;* for we have been unable to find any expression in the early decisions of this Court recognizing the existence of an implied contract or subsequently applying the notion which would justify the suggestion that the "implied contract" stops short of an agreement to render compensation within the full meaning of the Fifth Amendment. The action may not, in those cases, be technically upon the Fifth Amendment, but the implied contract rests upon the duty of the Government to comply with that Amendment. The duty, the implication of contract and the terms of the Amendment must accordingly be regarded as co-terminous.

And such is the plain language of the decisions, among the first of which is *United States* v. *Russell,* 13 Wallace, 623, 629, 630:

> " . . . the law will not imply a promise to pay unless some duty creates such an obligation. . . . " (p. 630).

What duty? Obviously the Fifth Amendment, and obviously co-extensive with that Amendment.

old of the action which the petitioner in that case accepted *cum onere*.

A further ground for the disallowance of interest or of an allowance in the nature of or measured by interest, distinguishing the *North American Co. Case* from the case at bar is found in the fact that the petitioner in that case delayed for six years (less one day) in filing suit on the status and remedy which it had accepted by acquiescing in the appropriation of its property. Under those conditions it was obviously the owner's move during the entire six-year period. A like doubt was cast on the owner's diligence in pressing the action to judgment in the Court of Claims. The conditions were thought to be of moment by this Court in deciding the question. Whether the United States may properly take the point, having invited the delay, is not a matter with which we are now concerned, for three conclusive reasons:

(a) In the proceeding under Section 10 of the Lever Act, it was up to the Government to suggest a preliminary amount. This having been proposed, rejected, and payment of 75% of the offer having been seasonably demanded, it was then up to the Govern-

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So it is in the great case of *U. S.* v. *Great Falls, etc., Co.*, 112 U. S. 645, 656:

> "In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an Act of Congress, taken the property of the claimant for public use, are under an obligation, *imposed by the Constitution*, to make compensation." (p. 656).

and so, in *U. S.* v. *Buffalo Pitts. Co.*, 234 U. S. 228, 235:

> "While the Government claimed the right to thus take and use the property, it nevertheless held it without denying the right of the owner to compensation. When it takes property under such circumstances for an authorized governmental use, it impliedly promises to pay therefor. This accords with the principles declared in the previous cases in this court and *arises because of the constitutional obligation embodied in the*

ment to pay that amount. This the Government failed to do. Any delay in the transfer of the controversy to the District Court must be fairly ascribed to the default of the Government;

(b) The judgment of the trial court is conclusive on this record;

(c) There is no fact or suggestion in the record which justifies any suggestion whatever of delay ascribable to the Seaboard.

In short, the lapse of time ensuing after the appropriation of this property on May 23, 1919, and the ascertainment on May 5, 1921, of its May 23, 1919, value, must be conclusively presumed on this record to be ordinarily and proximately due to the uncompensated seizure, from the consequences of which the Government might at any time have relieved itself by tendering just compensation under the Constitution. In the *Rogers Case,* the Government waited three years after seizure to institute proceedings, yet compensation measured by interest was allowed.

Fifth Amendment to the Constitution of the United States, guaranteeing the owner of property against its appropriation for a governmental use without compensation."

Under these circumstances it would seem that while the action on an implied contract is not under the Fifth Amendment (in the direct sense in which this proceeding is under Section 10 of the Lever Act) but is, technically and immediately, on an implied contract (*North American Company Case* and cases cited), it is difficult to understand how the implied contract itself, founded on a "duty imposed by the Constitution" can stop short of the fulfillment of that duty if the citizen presents his claim in the proper way.

These observations are not necessary to the decision of this case, for this is a proceeding in which the sole inquiry, by terms, is just compensation in all of its aspects. The point is mentioned because of its obvious importance and philosophical relation to the general discussion of compensation under the Fifth Amendment and general remedies for its rendition.

The distinctions are fundamental between the case at bar and the respects in which the record before the Court in the *North American Co. Case* were held not to warrant an allowance for use and occupation or in the nature of interest or measured by interest.

THIS PROCEEDING IS A COMPENSATION PROCEEDING CALLING FOR THE SAME ELEMENTS OF COMPENSATION PROPER TO BE AWARDED IN CONDEMNATION PROCEEDINGS FORMALLY INITIATED IN THE NAME OF THE UNITED STATES.

On the other hand, the result for which we contend under the circumstances of the case at bar are well sustained by the opinion in the *North American Co. Case.* Thus, it is clearly recognized in that opinion that one element of compensation due the owner may well be based on the use and occupation of his property during the period which precedes the passing of title (citing *Klages* v. *Phil. & Read. Term. Co.*, 160 Pa. St. 386), and that collection of an amount, *measured by interest,* is not prohibited either by the statute limiting the powers of the Court of Claims or by the common law rule which exempts the sovereign from liability to pay interest. The court expressly asserts (italics supplied) as to the suggestion above made that:

"This may be the theory on which interest *should be allowed* in compensation proceedings,"* citing

*Note the use of the term "compensation proceedings" and the purport and intent of Section 10 of the Lever Act establishing the sole procedure for the ascertainment and payment of just compensation, making repeated use of that term. It is, we respectfully assert, artificial in the extreme to assert that the exclusive procedure fixed by Section 10 is not only a "compensation proceeding" within the purview of the quoted expression from the opinion in the *North American Co. Case,* but a "condemnation proceeding" in every fair and substantial sense, as asserted by Judge Woods (Record, p. 24-26, 280 Fed. at p. 357, by the trial judge in *Filbin Corporation* v. *U. S.*, 265 U. S. at p. 356, and by the Circuit Court of Appeals for the Second Circuit in the *Benedict Case,* 280 Fed. 76 (80).

Moll v. *Sanitary District*, 228 Illinois 633, 636;
Lake Roen etc. Co. v. *McLain Co.*, 69 Kansas 334, 341-342;
Kidder v. *Oxford*, 116 Mass. 165;
Hamersley v. *New York City*, 56 N. Y. 533, 537;
Sioux City R. R. Co. v. *Brown*, 13 Nebraska, 317, 319;
Atlantic & Great Western Ry. Co. v. *Keblentz*, 21 Oh. St. 334, 338;

and proceeding as follows:

> "and it may be that, even in the absence of the conformity provision referred to above, interest could be collected *as a part of the just compensations* in condemnation proceedings brought by the Government. For, as suggested in *United States* v. *Sargent, supra,* ** such a proceeding is not a suit by a landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant and which the Government institutes in order to secure title to land. *Mason City & Fort Dodge R. R. Co.* v. *Boynton*, 204 U. S. 570."

We are in entire accord with the court's observation that suit in the Court of Claims by a property owner on an implied contract under the Tucker Act is subject to Section 177, if and to the extent that the petition seeks to claim interest *as such*. It by no means follows, as we have suggested above, that the equivalent of interest or that some recovery may not be recoverable for use and occupation, even in that form of action. The point is not involved or in any sense necessary to sustain the position for which we now contend, for there seems to be no defensible basis for the suggestion that the proceedings involved on this appeal is not in fact, substance and effect, a "compensation proceeding" and a "condemnation proceeding," which the Government set in motion

**162 Fed. 81.

by the seizure and has then forced into the District Court through its offer to pay $235.80 for property judicially ascertained to have been worth $6,000 on the date of its appropriation to public use.

The indispensable relation and unity under the statute in question between the seizure of the Seaboard's property and the institution of this proceeding to establish the compensation, *as such*—and not as for a breach of contract—is sufficiently pointed out by Judge Smith (*Filbin Corp.* v. *U. S.*, 265 Fed. 354) and by Judge Woods (Record pp. 24-6, 280 Fed. at p. 357), as well as in *U. S.* v. *Benedict*, 280 Fed. 76. Other authority is conclusive to the same end:

> A claim made against an Executive Department transmitted to the Court of Claims for a report is only a continuation of the original proceedings. *U. S.* v. *New York*, 160 U. S. 598.

The essential identity, so far as the question of compensation is concerned, between a technical condemnation proceeding and an action for compensation forced upon the owner by the action of the United States in seizing the property in advance of the ascertainment and payment of compensation is illustrated by the case of *U. S.* v. *Great Falls Mfg. Co.*, 112 U. S. 645,* in which the Government at first instituted formal proceedings

*For the purpose of removal, it may well be that a condemnation proceeding does not become a "suit at law" within the meaning of the Federal statutes until the controversy loses its *ex parte* nature after appeal to the courts from a preliminary *ex parte* consideration before Commissioners. *Boom Co.* v. *Patterson*, 98 U. S. 403, was a case of this character, in which is was held that the proceeding was not removable until it was appealed to the State District Court from the award of Commissioners and docketed as a suit. And see also *Pacific Railroad Removal Cases*, 115 U. S. 1, 18, in which a preliminary trial before the Mayor with a jury, antecedent to an appeal to the State Court, was held not to be a suit at law within the meaning of the removal statutes. A different result was pointed out in *Searl* v. *School*

for the condemnation of the property in the State of Maryland, but abandoned them, apparently for technical strategic reasons, and took possession. With reference to this situation the Court said, italics supplied:

> "In such a case, it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an act of Congress, *is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose*" (p. 658).

That a suit in the Court of Claims under the direct authority of the Infringement Act of June 25, 1910 (36 Stat. L., p. 851), was recognized as an essential step in the integral appropriation proceeding in effect authorized by that statute, was pointed out in the *Crozier Case*, 224 U. S. 290, the Court asserting that:

> "the Statute, looking at the substance of things, provides for the appropriation of a license to use the inventions, the appropriations thus made being sanctioned by means of compensation for which the statute provides. This being the substantial result of the statute," etc., etc. (224 U. S. at p. 305).

The technical—and at the same time an essential—difference between a proceeding by the property owner under Section 10 of the Lever Act and a suit under an implied contract under the Tucker Act is that, under the former, the property owner is not forced to adopt a fic-

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District, 124 U. S. 197, in which the condemnation proceeding was from its inception held to be a suit at law and removable at the outset, because, under the Colorado law there involved, the appointment of the Commissioners was a step in the suit after the filing of the petition and the service of summons upon the defendant.

Obviously, the question of removability has no bearing upon the question of compensation, and it is not to be doubted that the proceedings in *Boom Co.* v. *Patterson* and in *Pacific Railroad Removal Cases*, were steps in "condemnation proceedings" or "compensation proceedings" after they became subject to removal by their formal docketing for a plenary judicial hearing as to the quantum of compensation as fully as if they had been removable from the outset.

tion of agreement or contract in order to recover compensation. The words "condemn or appropriate" mean a taking of private property under the right of eminent domain *and not by a contract. St. Louis, etc., R. Co.* v. *Foltz,* 52 Fed. 627, 629. *Jackson* v. *New York,* 106 N. E. 758, 213 N. Y. 34, L. R. A. 1915-D, 492, Anno. Cas. 1916-C, 779.

The element of compulsion is actual. It is inconsistent with the notion of a contract on the part of the owner, and this adversary and non-contractual status endures so long as the property owner is not forced by the exigencies of the remedies available, either to resist or to waive the compulsion and adopt the fiction of an agreement. In *Atlanta, etc., R. Co.* v. *Southern R. Co.* (C. C. A.), 131 Fed. 657, 666, in an opinion by Judge Lurton, reference was made (p. 665) to Section 1866 of the Tennessee Code, which provided that an owner whose land has been taken may petition for a jury of inquest, and have the damages assessed *as if upon a petition by the Company* for a condemnation, or "sue for damages in the ordinary way." The effect of Section 10 of the Lever Act, which has been construed by this Court in the *Pfitsch Case* as reposing exclusive jurisdiction upon the District Courts, is the precise equivalent of a provision that the owner may, as in the case of the Tennessee statute, petition for a "jury of inquest," but without any right as in ordinary cases to sue in the Court of Claims under the Tucker Act on an implied contract. In short, an implied contract to make compensation may exist under ordinary principles but there is no remedy prescribed for its enforcement by suit against the United States in the Court of Claims, in the District Courts, or elsewhere. The distinction between a cause of action and a remedy is not adequately recognized by the opinion of the majority of the Circuit Court of Appeals in this case.

The "compensation" clauses of the various constitutions are generally held to be satisfied by statutes authorizing proceedings in the name of the owner against the government, state of national, to have the compensation assessed or damages awarded* and general laws may, of course, be adequate to that end. Such proceedings range all of the way from preliminary hearings before commissioners, with appeals to special tribunals or to the courts (as is the practical effect of Section 10 of the Lever Act), or from primary and *sui generis* actions in the courts on the broad injunction to the latter to "assess compensation," without definition as to the form of the action (as in *Crozier* v. *Krupp*, 224 U. S. 290); and, at the other extreme, to actions under general statutes, such as the Tucker Act, on implied contracts. It is safe to assert that all of them are in substance and effect compensation or condemnation proceedings where the property owner does not voluntarily abandon that position by waiving any question of inadequate remedy and assuming a position inconsistent with the idea of a "compensation proceeding," such as by *asserting and relying upon a contract*, as in the *North American Co. Case*. The waiver is highly technical even in that case. So far as this record and this proceeding are concerned there was no waiver and this proceeding stands as a compensation proceeding, actually and technically, on the direct authority of the statute.

It should be remembered that even in the most technical form of compensation or condemnation proceedings provision must be made at some stage for a judicial hear-

*20 Corp. Jur. 651, citing *Crozier* v. *Krupp*, 244 U. S. 290; *State* v. *Messenger*, 27 Minn. 119, 6 N. W. 457; *Bost* v. *Cabarrus County*, 152 N. C. 531, 67 S. E. 1066; *Branson* v. *Gee*, 25 Or. 462, 35 P. 527, 24 LRA 355; *Pittsburgh* v. *Scott*, 1 Pa. 309; *Bates* v. *Titusville*, 3 Pittsburgh (Pa.) 434. See also *German Sav., etc., Soc.* v. *Ramish*, 138 Cal. 120, 69 P. 89, 70 P. 1067; *Kimberly, etc., Co.*, v. *Hewitt*, 79 Wis. 334, 48 N. W. 373.

ing and determination, or its equivalent, of the amount due the owner for the appropriation. (*Matter of Pacific R. R. Com.*, 32 Fed. 241; *U. S.* v. *Klein*, 13 Wall. 147) with adequate recourse to test judicially the proposed compensation, which is always a judicial and not a legislative or administrative question. Proposition V, *supra*. It is manifestly unreasonable to attach any controlling significance to the fact that the problem reaches the courts on motion of the property owner who is forced to that recourse by an inadequate presidential award.

Statutes frequently make provision for an assessment of the compensation on motion of the property owner, where the public agency seeking to appropriate has not taken steps to assess compensation. 20 Corp. Jur. 1158, citing numerous cases. And where the owner is forced to bring an independent suit to enforce payment it has been expressly recognized that such suit is in effect to compel or enforce condemnation. 20 Corp. Jur. 1159; *Stuart* v. *Colorado Eastern R. Co.*, 61 Colo. 58, 156 Pac. 152.

The entire quibble pressed by the Government as to this proceeding not being in its substance and effect a compensation or condemnation proceeding can, we believe, be finally disposed of by the following digest of the law, quoted, with the authorities cited, from 20 Corp. Jur. 1159:

"In England, an owner may by a bill in equity compel a railroad to compensate him for land which it has taken for public use without compensating him therefor:

Inge v. *Birmingham, etc., R. Co.*, 3 De G. M. & G. 658, 52 Eng. Ch. 513, 43 Reprint 259; *Mason* v. *Stokes Bay Pier, etc., Co.*, 32 L. J. Ch. 110; *Adams* v. *London, etc., R. Co.*, 18 L. J. Ch. 357;

"And in New York a suit by the owner for damages and an alternative injunction *is considered and treated as substantially a condemnation proceeding:*

Sperb v. *Metropolitan El. R. Co.*, 137 N. Y. 155, 32 N. E. 1050, 20 LRA 752; *Hughes* v. *Metropolitan El. R. Co.*, 130 N. Y. 14, 28 N. E. 765; *American Bank Note Co.* v. *New York El. R. Co.*, 129 N. Y. 252, 29 N. E. 302; *Pappenheim* v. *Metro-*

politan El. R. Co., 128 N. Y. 436, 28 N. E. 518, 26 AmSR 486, 13 LRA 401; *Westphal* v. *New York*, 75 App. Div. 252, 78 NYS 56; *Purdy* v. *Manhattan R. Co.*, 3 Misc. 50, 634, 22 NYS 943; *Cunard* v. *Manhattan R. Co.*, 1 Misc. 151, 20 NYS 724; *Jones* v. *New York El. R. Co.*, 18 NYS 952; *Seebach* v. *Metropolitan El. R. Co.*, 18 NYS 208; *Smith* v. *New York El. R. Co.*, 18 NYS 132;

"and in such case the alternative damages are awarded *to the same extent and for the same elements, as the compensation in a special proceeding for the condemnation of land under the law of eminent domain:*"

Bohm v. *Metropolitan El. R. Co.*, 129 N. Y. 576, 29 N. E. 802, 14 LRA 344; *American Bank-Note Co.* v. *New York El. R. Co.*, 129 N. Y. 252, 29 N. E. 302 (mod. 59 N. Y. Supre. Ct. 175, 13 NYS 626); *Blumenthal* v. *New York El. R. Co.*, 60 N. Y. Super. 95, 17 NYS 481 (mod. on other grounds 137 N. Y. 559 mem. 33 N. E. 337 mem.).

Thus it is seen that the broad conclusions of this Court asserted in *U. S.* v. *Great Falls Mfg. Co.*, 112 U. S. 645, and in the *Crozier Case*, 224 U. S. at p. 305, quoted *supra*, are in line with the sound expressions of other courts of high authority.

THIS PROCEEDING BEING IN SUBSTANCE AND EFFECT A COMPENSATION OR CONDEMNATION PROCEEDING WITHIN THE BROAD CONTEMPLATION OF THOSE TERMS AS EMPLOYED IN NORTH AMERICAN CO. *v.* U. S. AND IN U. S. *v.* ROGERS, AN ALLOWANCE IN THE NATURE OF OR EQUIVALENT TO INTEREST WAS PROPER AS AN ELEMENT OF COMPENSATION.

For the conclusion stated in this heading the opinions in the *North American Co.* and *Rogers Cases*, quoted *supra*, are final and sufficient authority. The discussions by Judge Woods in his dissenting opinion in this case and by the Circuit Court of Appeals for the Second Circuit in the *Benedict Case* are manifestly on sounder ground than the majority opinion by Judge Waddill in the case at bar.

The following considerations may appropriately be urged as inevitably sustaining the sounder view for which we contend on this appeal, supplementing the references and the authorities above set out:

While, generally, interest *as such* is not allowed on the award of compensation, in the absence of statute or contract, it may in proper cases be allowed as an element of just compensation (10 Corpus Juris, p. 806, note 92); and "according to the great weight of authority, where payment of compensation does not accompany the taking of land for public use but is postponed to a later period, the landowner is entitled to interest, to be computed from the time of the taking, or what amounts to the same thing, to *damages in the nature of interest.*"

> 20 Corpus Juris, p. 807, note 93, citing many cases, to which are to be added *Crane* v. *Craig*, 130 N. E. 609, and the decisions already referred to in this brief viz:
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> *U. S.* v. *Rogers*, 225 U. S. 163; *U. S.* v. *Highsmith*, 255 U. S. 170;
>
> *U. S.* v. *Sargent*, 162 Fed. 81, 84;
>
> *U. S.* v. *Benedict*, 280 Fed. 76; *Prince Line* v. *U. S.* 283 U. S. 535;
>
> *Pfitsch* v. *U. S.* in District Court (see recital in 256 U. S. 547, 549);
>
> *Nat'l Lab. & Sup. Co.* v. *U. S.*, 275 Fed. 218.

Also the references made by this Court in the *North American Co. Case:*

> 15 Cyc. 930, 931;
> 10 R. C. L., p. 163;

and also, on the general principle:

> *Watson* v. *Jersey City*, 84 N. J. L. 422, 86 Atl. 402, L. R. A. 1916 C, 1106 and note, making plain that the decisive question is whether the owner has been ousted from possession;
>
> *Penn. Co. etc.* v. *Philadelphia*, 262 Pa. 439, 105 Atl. 630, 2 A. L. R. 1573.

The observation of the Court in *U. S.* v. *Rogers*, to the effect that "the allowance of just compensation by giving interest from the time of the taking until payment is a

convenient and fair method of ascertaining the sum to which the owner of land is entitled" is not only intrinsically sound as a matter of general or judicial knowledge; it is also sustained both by the presumptions which, as we have pointed out, are conclusive upon this record as well as by direct and well supported precedents.

The land involved in this proceeding was an integral part of a railroad yard (Record, p. 2), which as a matter of fact, although not shown by this record, had not, at the time of the taking been improved or actually devoted to that use (the Seaboard having just completed its low grade line opening up the route between Hamlet, Charleston and Savannah) when the entire property of the Seaboard, including the premises in question, was seized by the President under the Proclamation of December 26, 1917 (40 Stat. L. 1733) under the supposed authority of the Federal Possession and Control Act of August 29, 1916 (39 Stat. L. 645). *Seaboard Air Line Ry.* v. *U. S.*, 275 Fed. 77 (80, 81). The occupation of the property by the United States between December 28, 1917, the effective date of Federal control of railroads, and May 23, 1919, was under the railway seizure, the Government conceiving on the latter date that it was necessary to condemn the property outright (*ib.* p. 81). We have no hesitation in making this reference for the reason that Federal control of all trunk line railroads is a status within the judicial knowledge of this Court.

In any event it is plain that property condemned—being yard property under seizure by the Government as part of a system of trunk line railroad—had no definite or fixed or ascertainable, or, rather, separable market rental value. The current compensation being paid or to be paid by the United States for this yard property under the railway seizure was obviously not capable of rational separation from the integral compensation due the Seaboard for the seizure of its system as a whole.

Under these circumstances an interest rental plainly represents the fairest measure for determining that element of compensation to which the Seaboard was entitled for the uncompensated value of the use or for loss of the use of its property pending the ascertainment and award of the damages and compensation representing the bare value of the property seized.

Thus, in *Re Condemnation of Lands for Military Camp,* 250 Fed. 314, the court, in fixing the "rental" value of lands seized for temporary camp use by the Government held:

> "If the land is wild, and not subject to cultivation, the rental should be the prevailing rate of interest on its fair value" (p. 315).

In *N. Y. etc. Co.* v. *Fraser,* 130 U. S. 611, this court approved an interest rental as the value of the use of a machine in the absence of any other evidence as to rental value. To the same effect are *Moore* v. *King,* 23 S. W. 484; *Louisville & I. R. Co.* v. *Schuester,* 183 Ky. 504, 209 S. W. 542; and note, 4 A. L. R., at p. 1363; *Nahhas* v. *Browning,* 183 Pac. 442, 6 A. L. R. 476, 23 R. C. L. 911, 912.

Analogies sustaining this intensely practical conclusion of this and other courts on the subject are available —too numerous to catalogue; such as the right of a railroad under the Constitution to freedom from regulation which will impair its ability to earn a reasonable return upon the fair value of its property—an inquiry in which the going rate of interest has a direct bearing (*Lincoln Gas Case,* 250 U. S. 256); also the provisions of Section 6 of the Federal Control Act of March 21, 1918, (40 Stat. L. 451) requiring the President to allow an interest rental on the cost of Federal expenditures for additions and betterments sought to be charged to the owners of the systems under Federal control, etc., etc.; and the

express injunction of Section 2 of that Act that any deficiency in respect to "compensation" paid currently to the owners of the seized properties shall bear interest. It is not to be supposed that this allowance would have been made if it were not regarded as obligatory as a part of the compensation due the owner under the Constitution.

The recognition of equivalents has always characterized the test by this Court of constitutional questions. Thus, in *U. S. Express Company* v. *Minnesota*, 223 U. S. 335, 347, the Court restated the well established principle that it is the nature and not the name of a tax which determines its constitutional bearing and that by whatever name called a tax will not be held violative of the Constitution, if it amounts to no more than the ordinary tax upon property *or a just equivalent therefor.* The tax sustained in that case was a tax of six per cent upon gross receipts in lieu of all taxes upon the property of the Express Company. As a tax upon receipts derived from interstate commerce it would have been void. As a commutation tax *measured by or upon gross receipts* and not in excess of a fair ad valorem tax it was valid. To the same effect was *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, 455, etc. We are here dealing with compensation or its equivalent and not with interest as such.

When the President and his agencies recognized, in their practical and administrative interpretation of Section 10 of the Lever Act, as they did in this case and in the Benedict Case, that interest from the date of ouster to the date of voucher was an element or measure of "just compensation," upon what theory may they now insist that interest can not be legally adopted by the courts as any such equivalent or measure? They had no authority to allow interest as such. They had authority merely to allow "just compensation." In reacting to this

necessity they found and applied what they conceived to be a practical, common sense measure or equivalent exactly as this Court, in the quoted expression from the *Rogers Case* and the Circuit Court of Appeals in *U. S.* v. *Sargent*, 162 Fed. 81, 84, found the allowance of a sum equal to interest to be

> "a palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain, namely, of making 'just compensation,' for the land as it stands at the time of taking."

INTEREST OR ITS EQUIVALENT AS AN ELEMENT OF COMPENSATION.

In general, it is difficult to understand how it can be seriously contended that the interval elapsing between the ouster of the owner and the award and payment of compensation, which necessarily elapses and which can not be avoided by the owner by any reasonable diligence on his part, can be ignored without violation of the letter and spirit of the Fifth Amendment.

The term just compensation means the "full and perfect equivalent" or the "exact equivalent" of what has been taken. If property be seized to-day and the award in terms of its bare value to-day, be ascertained and paid two years hence as a proximate result of the procedure for ascertaining and recovering compensation forced upon the owner, it is incontestable that the compensation so awarded is neither just nor reasonable nor the full and perfect or exact equivalent of what was taken.

Fictions of "implied promises," and of a theoretical readiness on part of the Government to discharge its obligations, do not satisfy the Constitution when they are shown by the record to be illusory in point of fact. There is no reason for the assumption that the Constitu-

tion overlooks what is plain to the courts and to every one else.*

It is not sufficient to assert that the implied promise of the Government, actionable under the Tucker Act, and subject to the limitation of Section 177 of the Judicial Code, has been generally considered to afford just compensation in providing for the ultimate payment of the bare value of the property appropriated, reckoned as of the date of the seizure. The question now squarely presented has never been raised on a proper record. We have shown that the record was not adequate to that end in the *North American Company Case.*

Perhaps the only case in which the sufficiency of the remedy represented by the Tucker Act and the theory

*Slight reflection will make plain the fact that the underlying purpose of the Fifth Amendment was to obviate just such consequences as are now pressed by the Government. Let us assume a case where the Government has seized property, in advance of compensation, in May, 1914, when the value of the property is worth $6,000 in terms of the current dollar, the purchasing power of which was reflected in a commodity index number of 100; and that by reason of the delay in procedure forced on the property owner to secure compensation, the Government eventually tenders him an award for that number of dollars in May, 1920, when inflation and war credits have shrunk the purchasing power of the dollar to the extent reflected in an index number of 247. The illustration would be still more forcible if we assumed a shrinkage in exchange value equivalent to that of the German mark. To assert that the Constitution would not protect the owner of property against any such debacle and that always and under all circumstances the sole obligation on part of the Government is to pay, ultimately and whenever it is willing to allow the award to become definite, the same number of dollars or pieces of paper called dollars that at the time of the seizure represented the value of the property measured in terms of a much more valuable unit of exchange, is, merely, to scuttle the purpose of the Fifth Amendment. One of the purposes of that amendment was to assure the protection of the citizen against legislation which during the Revolutionary period was resorted to by the States, fixing both prices for commodities and the par of exchange for Continental currency, notwithstanding its actual shrinkage in exchange value. The compensation clause of the Constitution deals with equivalents and not with fictions.

of an implied promise to pay bare value can be said to have been inferentially sustained is *Crozier* v. *Krupp, supra* (224 U. S. 290), in which the question of the uncompensated lost use of property presented by this record was not raised or apparently considered and in which the opinion of the court by the Chief Justice was meticulous in its care in pointing out that the opinion sustaining the adequacy of the remedy was confined strictly to the conditions before the court:

> "that is, the intangible nature—patent rights—of the property taken";

and was, moreover, justified by the case then before the Court for the reason that

> "no contention was made in argument by counsel for the corporation that the statute of 1910 does not provide methods of compensation adequate to the exercise of the power of taking for which the statute provides. Thus, in the argument, it is said: 'If the officers of the United States have since the act * * * used or shall hereafter use complainant's patented design, it is possible or probable that complainant may receive reasonable compensation under the act in the Court of Claims'."

The use by a potential customer of a patented idea does not oust the owner of the patent from the use of his property. It does not at all present the question here involved, which deals with the threat of uncompensated loss of possession of tangible property.

Among other authorities dealing with the question from the sole standpoint of interest, *as such*, cited by the Circuit Court of Appeals in this proceeding, and plainly not responsive to the questions raised by this record are *Watts* v. *U. S.*, 129 Fed. 222, 226, and *Pennell* v. *U. S.*, 162 Fed. 75 (Record, p. 19, 280 Fed. at p. 353). It is only necessary to quote from these cases to demonstrate that just compensation is not rendered to the property owner by a belated award of the bare value of the property taken years earlier:

"It is contended that the disallowance of interest is unjust and excludes the libelants from a full recovery of the damages sustained. *Such appears to be the fact. Without interest, the recovery is only partial,* but it is too well established to admit of argument that the Government is not liable for interest on damage claims, in the absence of an express statutory provision or stipulation covering it."

Watts v. *U. S.*, 129 Fed. 222, 226, cited in *Pennell* v. *U. S., supra.*

All these cases dealing with the limitation imposed by the Government on remedies which under the prevailing notions of sovereignity it might withhold altogether have no bearing upon the question of just compensation under the Constitution. To assert that a remedy (which admittedly affords a partial recovery (as in the *Watts* and *Pennell Cases, supra*) at the same time satisfies the Consituation when we are dealing with compensation *in toto,* is a solecism upon its face.

There can be no successful answer to the reasoning or observations of the Circuit Court of Appeals in the *Rogers Case* (257 Fed. 397, 400), so decisively upheld by this Court:

"Something of substance is lacking in an award that omits all consideration of the time of the prior actual taking. That would be obvious in the case of a completed office building, and the differences here is but in degree, not in principle;"

"COMPENSATION" UNDER THE JAY TREATY OF 1794*

The conception thus sustained by this Court in the *Rogers Case* was not novel. It is as old as the Constitution itself. In fact, it was first announced in a judicial

*Other awards of interest as a part or measure of compensation under treaties for the determination of just compensation are omitted to avoid an undue extension of this brief; one of the most striking instances being the award under the recent treaty with Norway in which interest was allowed on the base amounts due on requisition of property by the United States.

proceeding by a distinguished contemporary of the framers of the Constitution who was a member of the Maryland legislature which ratified the Constitution and the first ten Amendments. William Pinckney, afterward Attorney-General of the United States, was a member of the Commission established under Section VII of the Jay Treaty of 1794, to award just compensation for vessels and cargoes seized by Great Britain during the Revolution.

The question arose before the Commission whether interest should be awarded on the amounts found to be the value of the property from the time of the taking until the award, including a period during which the proceedings of the Commission had been suspended by action of the British Government. Mr. Pinckney announced the opinion of the Commission that interest should be included in the awards, saying:

> "They admit (*i.e.*, the British Commissioners) that we are empowered to grant interest both before the interval of suspension and since. Whence do we derive that power? Certainly not from any words of the treaty taking notice of interest *eo nomine* or giving a defined or modified authority on the subject of it. We derive it simply from those words of the treaty which submit *the amount of compensation to our decision.*
>
> "The conceded power, therefore, to give interest on either side of the suspension rests upon this, that such a power is necessary to enable us to settle *the amount of compensation* according to our notions of equity and justice." MOORE, International Arbitrations, p. 4316.

INTEREST OR AN AMOUNT EQUIVALENT TO OR MEASURED BY INTEREST HAS BEEN AWARDED IN THE PAST IN COMPENSATION INQUIRIES WITHOUT PROVISION EO NOMINE TO THAT EFFECT.

The *Rogers Case* and the group of cases heretofore cited are not the only cases in which this Court has

awarded interest against the United States in proceedings where the United States has submitted to the courts the amount of compensation to be awarded, without mention of interest.

One such case is *The Nuestra Senora De Regla,* 108 U. S. 92, in which the opinion was written by Mr. Chief Justice Waite. A Spanish steamer had been seized by the United States during the Civil War and libeled as a prize. The District Court permitted the United States to have possession and use of the vessel pending the decision of the case. On June 20, 1863, it decreed the return of the vessel to its owner. It was then agreed by the parties to suspend proceedings looking toward the ascertainment of damages to the end that the matter might be settled diplomatically. Seven years later the Acting Secretary of State requested of the Spanish Minister that "the parties interested should apply to the court which still retains jurisdiction of the case, to obtain such further relief as justice may demand and in the mode which that tribunal shall deem most proper and convenient." Suit was thereupon brought in the District Court of the United States.

Although the action was formally the resumption of an action brought by the United States, the Court speaking through the Chief Justice, found no difficulty in disposing of the proceeding in accordance with its substance. The Court said:

> "Since without the consent of the United States, no judgment for damages could be rendered against them in the pending suit that could be enforced by execution, the Spanish Government had the right to assume the prosecution of the claim, and it did. * * * When, therefore, the United States, through the executive of the Nation waved their right to exemption from suit, and asked the prize court to complete the adjudication of a cause which was rightfully begun in that jurisdiction, we think the

Government is bound by the submission, and that it is the duty of the court to proceed to the final determination of all the questions legitimately involved."

This Court, therefore, plainly regarded the case as one in which the United States had waived its exemption from suit and was being sued to recover full compensation, both for the seizure of the vessel before the decision of the prize court and also for just compensation for the requisition and use of the vessel. The judgment of the court was as follows:

"Our conclusion is that damages ought to be allowed as follows:

"For unnecessary and unusual delay in proceeding to adjudication, 175 days at $200	$35,000
"For value of vessel	$30,000

"To which add interest, at the rate of six per cent per annum, from the time of the order of restitution, June 20, 1863, until the decree."

In the case cited there was no permission by the Government to allow interest *eo nomine*, but only permission to give such judgment as "justice may require and in that mode which the tribunal shall deem most proper and convenient." The last phrase is almost the expression used by this Court in the *Rogers Case* when it allowed interest as a "convenient and fair method" of determining just compensation under the Constitution. It is apparent, therefore, that the Circuit Court of Appeals fell into error in supposing that interest or its equivalent can never be granted against the United States unless legislation provides for the allowance of interest *eo nomine*.

In still another case arising out of the Civil War this Court allowed interest or its equivalent in a suit against

the United States, although the legislation authorizing the suit did not, in terms, provide for the allowance of interest. *United States* v. *New York*, 160 U. S. 598. This case has been cited and was also referred to in the opinion of this Court in the *North American Case*. Its importance warrants some analysis.

During the course of the Civil War the Congress passed an act "to indemnify the states for expenses incurred by them in defense of the United States." The Act directed the Secretary of the Treasury to pay to the Governor of any state "the costs, charges and expenses properly incurred by such state" in raising and equipping troops. The State of New York expended approximately $3,000,000 for these purposes. This amount it raised partly by issuing bonds on which it paid interest, and partly by taking money from the Canal Fund, a fund established to pay bonds issued to build canals. Upon the latter amount the Canal Commissioners charged the State 5 per cent interest. The State of New York claimed a sum equal to the principal and the interest upon both amounts.

The case came before the Court of Claims after the enactment of the law which is now Section 177 of the Judicial Code prohibiting the allowance of interest by the Court of Claims prior to the rendition of judgment. The Court of Claims, however, allowed an amount equal to the interest paid by the State upon its bonds but refused to allow the interest claimed upon the sum taken from the Canal Fund. Both the United States and the State of New York appealed.

This court, speaking through Mr. Justice Harlan, allowed interest on both items. The opinion asserted that the Act allowing the claim was one "to indemnify" the state for expenses incurred in the war and must be liberally construed. The interest on the bonds, he said, was an expense properly incurred by the State within the

meaning of the Act. The interest upon money taken from the canal fund was obviously not an expense incurred by the State in the ordinary sense. It was a loss of income which the State might have had and not an actual expenditure of money. Nevertheless, the court declared that the State was equitably entitled to be paid for this loss. The opinion proceeds:

> "If the canal fund money, used by the state comptroller to defray the expenses of raising and equipping troops, had been borrowed upon the bonds of the state sold in the open market, the interest paid upon such bonds would, for the reasons we have stated, be a just charge against the United States on account of expenses properly incurred by the state for the purposes expressed by Congress. And such would have been the result, if moneys of the canal fund had been invested by the commissioners directly in bonds of the state, bearing the same rate of interest that was paid to the commissioners of that fund."

Looking through the form to the substance of the transaction this court held that the interest charged by the State against itself was allowable in its claim against the United States. The same considerations which led the court to insist upon a liberal construction of the Act of July 27, 1861, apply to Section 10 of the Lever Act. This, too, was an act to indemnity for losses incurred in time of war in aid of the Government, and incurred by reason of the exercise of the most arbitrary of all governmental powers, the power summarily to seize private property without legal proceedings of any sort. Here, if anywhere, the situation calls for liberality of treatment for the private citizen or corporation.

Here, too, the same sort of technical answer is made to the claim of the citizen as was made in the New York case. There the State would have been admittedly entitled to interest if the money had been raised in the

form of a loan, although the substance of the transaction would have been the same. In the present case the Government would not deny that if it had been required to institute adversary proceedings prior to its occupancy the present case would come squarely within the rule of *Rogers* v. *United States, supra.* But the substance of the transaction would have remained unaltered. The loss for which the plaintiff in error would claim just compensation would have been the same. When Congress provided under the stress of war for a summary method of condemnation, for a method necessarily speedy and arbitrary, which is to be contemplated only on the hypothesis of an unconditional pledge of the public faith to the payment of full compensation (*Crozier* v. *Krupp*) it did not intend that the property owners' right to just compensation should be narrowed by its own necessity for haste, or that its pledge should be repudiated by construction.

The contrary is the only just conclusion. Certainly this statute should be construed to give the property owner the full benefit of the Fifth Amendment, pitched on the sound interpretation of "compensation" expounded by this Court in the *Rogers Case,* and made obligatory by the established observations of this Court to the effect that the Constitution in providing for just compensation for property seized under the power of eminent domain "is to be construed liberally in favor of the citizen."

CONCLUSION.

We can not conclude this discussion more aptly than by contrasting the doctrine for which we contend with the technical, wholly formal, and clearly inequitable result asserted by the Circuit Court of Appeals, for as stated by Judge Woods in the dissenting opinion in this record:

"There is no denial in the majority opinion in the case before us that just compensation required by the Constitution is not complete without the payment of the value at the date of the taking with interest to the date of payment" (Record, p. 24, 280 Fed. at p. 357).

The conclusion deducible from the position of majority and from the cases cited and relied upon in majority opinion is that the statute purporting authorize the property owner to recover full compe tion does not, in fact, accomplish or authorize result; and that, accordingly, the Seaboard's remedy to enjoin the trespass upon its property unlawf undertaken by the Government in the absence of pr sion for full and adequate compensation. If that in pretation were to prevail it is clear that the citizen w in the future be reluctant to accept the assurance compensation held out as authorizing emergency seiz and would be constrained to deal with the agents of Government as representatives of an agency unwil to comply with the Constitution, that is, as trespass

We entertain no doubt of the error of the view asse by the Circuit Court of Appeals and respectfully req that the judgment of that Court be reversed and judgment of the District Court affirmed.

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January, 1923.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 407

SEABOARD AIR LINE RAILWAY COMPANY, GUARANTY TRUST COMPANY OF NEW YORK, AND WILLIAM C. COX,
Plaintiffs in Error.

v.

THE UNITED STATES, *Defendant in Error.*

REPLY BRIEF FOR PLAINTIFFS IN ERROR

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QUESTION IS NOT ONE OF INTEREST AS A PENALTY BUT OF AN ALLOWANCE MEASUREDBY INTEREST AS A PRIMARY AND SUBSTANTIVE ELEMENT OF JUST COMPENSATION.

In the brief filed on behalf of the United States in this case and in the *Benedict Case*, No. 394, the Government asserts that the two writs of error "raised the question whether interest may be allowed by the District Courts upon the amount found by the court to be the value of property taken by the United States under the Act of

August 10, 1917, commonly called the Lever Act, 40 Stat. L. 276, in cases where the owner refused to accept the award made by the President and brought suit in the District Court as authorized by said Act."

A more accurate method of stating the question involved is set out in the first paragraph of the Seaboard's main brief on file herein (p. 1). The question is whether *any allowance* in addition to the bare land value on the date of seizure may be made as a proper element of that full, just, compensation to which the owner is entitled under the Constitution, where the award and payment of compensation is materially later than the ouster of the owner. We contend that the unavoidable delay forced on the property owner in having his compensation ascertained and awarded must be compensated if the taking is to be squared with the Fifth Amendment. We assert that in the absence of any other evidence the allowance of an amount equivalent to interest is a fair and just method of awarding compensation.

Our exception to the general statement of the issue on behalf of the United States is that it does not recognize the distinction between the allowance of interest as such, that is, as a penalty for default, and the allowance of an amount equivalent to interest as a fair measure of a substantive element of just compensation. This too narrow view on the part of the United States will be made plainer as we proceed.

AN EXECUTIVE OR LEGISLATIVE ULTIMATUM DOES NOT SATISFY THE FIFTH AMENDMENT UNLESS THE AMOUNT SO ARRIVED AT ACTUALLY SATISFIES JUDICIAL TESTS.

It is asserted by the Government (Brief, p. 7, *et seq*) that "under the Constitution, when private property is taken for public use, no particular method for ascertaining the just compensation to which the owner is entitled

is necessary. All that is required is that it be conducted in some fair and just manner with opportunity for the owner to present evidence and be heard." Undoubtedly that suggestion would meet the accepted requirement of due process under the Fifth Amendment provided the hearing is essentially judicial in character, but if it means that an award by the President, *without adequate recourse to the property owner to subject such award to an essentially judicial test of its adequacy,* complies with the *due process and just compensation* clauses of the Fifth Amendment, we cannot agree with the Government.

See *Monongahela Navigation Co.* v. *U. S.*, 148 U. S. 312, and other cases cited Seaboard's main brief, Proposition V, page 10; also authorities *infra.*

THE PRESIDENT'S AWARD UNDER SECTION 10 OF THE LEVER ACT AMOUNTS TO NO MORE THAN A NEGOTIATION FOR SETTLEMENT OR A TENDER. IT IS NOT, IN AND OF ITSELF, AN ADEQUATE REMEDY FOR THE ASCERTAINMENT AND PAYMENT OF JUST COMPENSATION UNLESS THE PARTICULAR TENDER HAPPENS TO SATISFY THE JUDICIAL TESTS OTHERWISE MADE AVAILABLE TO THE PROPERTY OWNER FOR DETERMINING THE FAIR AMOUNT DUE.

The Government's brief, following what we conceive to be the erroneous notion above indicated, proceeds to assert:

> "Under the Lever Act, two methods were provided (to determine the amount of compensation), and the property owner had his choice.
>
> "First, the President was directed to ascertain and pay it. This was direct, sure, and speedy, and if the property owner accepted all questions of interest or legal technicalities would be obviated.
>
> "Second, if the owner was unwilling to accept the President's award, he could take seventy-five per cent (75%) of it and sue for the balance * * *."

We take issue with the foregoing suggestion that the first of the alternatives thus pointed out by the government (that is, an award by the President) would satisfy either the due process or just compensation clause of the Fifth Amendment. The determination of the amount of compensation as a tentative, preliminary, and *ex parte* award by the President cannot be seriously advanced as constituting that adequate and effective remedy by which the owner may have full compensation determined and paid within the meaning of the Fifth Amendment. (See Proposition II, Seaboard main brief, p. 9.) Any such notion was scouted in *Shoemaker* v. *U. S.*, 147 U. S. 282, 302, where it was pointed out that it is not unusual for the government itself to fix a limitation upon its expenditures in connection with the appropriation of private property; "but", asserted the court,

> "nobody ever thought that such a limitation had anything to do with what the owners of property should have a right to receive in case proceedings to condemn had to be resorted to."

This applies, also, in case the owner should not choose to accept the President's offer of the statutory limit. Of course, the same observation would apply to an *ex parte* determination by the President of the amount due the property owner, for the question of compensation is a judicial question and not a legislative or executive ultimatum. The President has not and could not be given by Congress, jurisdiction to determine finally and conclusively the rights of the owner of property under the Federal Constitution, free from scrutiny as a judicial question either by the Courts or by a fairly equivalent judicial process.

Monongahela Nav. Co. v. *U. S.*, 148 U. S. 312, 327.
Shoemaker v. *U. S.*, 147 U. S. 282, 302.

Albert Hanson Lbr. Co. v. *U. S.*, 277 Fed. 894, 897.
Chicago, etc., R. Co. v. *Minnesota*, 134 U. S. 418.
Missouri v. *C., B. & Q. R. R. Co.*, 241 U. S. 533.

Wadley Southern Ry. v. *Georgia*, 255 U. S. 651; any person affected by orders by a legislature or commission (and, *a fortiori*, by an executive ultimatum) "is entitled by the due process clause to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution."

Oregon R. R. & N. Co. v. *Fairchild*, 224 U. S. 510; "the mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law if the necessary result be to deprive him of his property without compensation."

Some courts hold that the tribunal must be judicial in fact. While this may not be indispensable, there can be no doubt of the necessity that it shall be judicial in character and approach; and that an executive officer or department seizing the property is not an "impartial tribunal" must be plain on any consideration of the rudiments of fair play. 20 Corpus Juris, p. 993, note 23.*

For these reasons the conception of the Government,

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*Fair samples of the executive machinery as a tribunal for the award of just compensation under the Constitution may be found in the *Seaboard* and *Benedict Cases* and in the following recent judicial reviews of the executive ultimata:

National City Bank v. *U. S.*, 275 Fed. 855.
C. G. Blake Co. v. *U. S.*, 275 Fed. 861.
U. S. v. *New River Collieries Co.*, 276 Fed. 690.
Gulf Refining Co. v. *U. S.*, Court of Claims, June 12, 1922.
Hudson Navigation Co. v. *U. S.*, Court of Claims, June 12, 1922.
Prince Line v. *U. S.*, 283 U. S. 535.

and of the majority opinion of the Circuit Court of Appeals for the Fourth Circuit, that the preliminary award by the President provided for by Section 10 of the Lever Act, prevents a complete and sufficient constitutional method and remedy open to the property owner, is grossly erroneous. It carries the necessary implication that Congress might well have stopped with that so-called remedy without violating the Constitution. We take exception to any such indefensible suggestion.

By tendering less than full compensation in all of its elements, the Government cannot force the property owner to an inadequate remedy as the property owner's only alternative recourse for obtaining just compensation or for a judicial test of that question. That erroneous conception is, however, necessary to one of the main aspects of the Government's argument, viz; that the property owner had a complete remedy through the acceptance of the Presidential award and voluntarily waived that remedy to take the so-called "alternative" process of inquiry in the District Court. The opinion of the Circuit Court of Appeals for the Fourth Circuit ingenuously advances the same erroneous notion when it asserts (Printed record, p. 21, quoted in the Government's brief, p. 26) that Congress wisely foresaw that the settlement of claims would necessarily consume much time and almost unavoidably involve heavy loss to the Government and that, therefore, "under these conditions, Congress rightfully refused to impose upon the Government the further burden of paying interest on claims pending delays *incident to such contests.*" As if the Government could abolish the Constitution to suit its own convenience!

And note this extraordinary suggestion from the opinion of Judge Waddill, quoted in the Government's brief at the point last stated:

"Indeed, all claim of injustice on the part of the Government is silenced, when it undertook voluntarily the payment in advance of seventy-five per cent of its award, on account of such claims."

In short, asserts Judge Waddill and the learned counsel for the Government, the only reason why the Seaboard has encountered delay in the award of compensation is because it captiously declined to accept $265.80 for property which is conclusively shown on this record to have been worth $6,000; and the property owners in the *Benedict Case* were confronted with the loss of the use of their property or its constitutional equivalent only because they bumptiously declined to accept $1,796,522.20 for property which has been conclusively shown to have been worth $3,428,644.00.*

It would be impossible to apply to the Government's position a more complete *reductio ad absurdum* than merely to state the foregoing recital of that contention; yet counsel for the Government presses the monstrosity of that suggestion to its maximum by quoting from an unreported opinion said to have been rendered by the District Court of Connecticut, in which the following amazing mutilation of the principle of just compensation is expressed:

"In the latter cases the failure of the property owners to receive *the amount awarded* has been due to their refusal to accept *the amount awarded*, so that the delay in the receipt of the entire amount of damages awarded is due, partly, if not wholly, *to the action and conduct of the property owners.*"

*The Fifth Amendment does not countenance any such abuse of the rudiments of fair play. Penalties imposed upon a citizen for asserting his rights under the Constitution can hardly find sanctuary under that instrument. *Chicago & N. W. R. Co.* v. *N. Y. C., etc., Co.*, U. S. Supt. Ct., November 13, 1922, 67 L. ed. Adv. op. 46.

If the President had tendered the full amount subsequently established by the Court, the observation of the District Court was sound and unanswerable. But we must assume that counsel for the Government would not mislead this court by employing the quotation if that were the case, for it would have no remote bearing, in such event, on the question here involved. The quotation is pertinent as a precedent (and a surpassingly erroneous one) only in the event that, as here, the President's tender was substantially less than the amount judicially ascertained by the District Court to have been due.

In both the *Seaboard Case* and the *Benedict Case*, the President offered a grossly inadequate amount. He did not pay any part of that amount to the property owner in the *Seaboard Case*. To assert, accordingly, that the failure of the Seaboard (or, indeed, the owners of the property in the *Benedict Case*) to receive the full and perfect equivalent of their property as of the date of seizure has been due to some free *election* of remedies on part of the owners in their failure to accept the presidential award, would be regarded as jocosely intended if it had not been announced in the opinions of lower courts referred to above and solemnly restated as sound by counsel for the Government of the United States in their brief before this Court.

THE TRUE FUNCTION OF THE PRESIDENTIAL AWARD AND TENDER.

As a matter of course, the only possible construction of the presidential award under Section 10, is that it was intended to provide a possible basis for a negotiated settlement and, on that failing, to afford a partial mitigation of damages and loss to the owner, pending a definite

award in accordance with the Constitution; a loss which, if not thus mitigated, the owner must ultimately be permitted to realize in the compensation proceeding necessarily provided to accompany the seizure, if the taking was valid. By no sort of distortion could the *ex parte* conclusion of the President be interpreted as a constitutional and adequate remedy in favor of the property owner which he must refuse on the penalty of having to accept some other inadequate alternative (such as long deferred award of the bare land value, without compensation for the use of the property *or its constitutional equivalent* lost to the owner, a result in and of itself admitted to be short of full compensation if administered according to the Government's erroneous construction of Section 10 of the Lever Act).

PLENARY INQUIRY UNDER SECTION 10 OF THE LEVER ACT IS NOT AN ACTION ON A CONTRACT.

Having started with the erroneous premise above stated, the brief for the Government treats the inquest authorized at the instance of the property owner under Section 10 of the Lever Act as "*an action upon the contract* which the United States had made in the Act itself to pay just compensation." (Government's brief, p. 9.)

This is the same erroneous notion which was stated by Judge Waddill, speaking for the Circuit Court of Appeals. In the Seaboard's Main Brief, pages 19, 20, 25, etc., we pointed out that the action under Section 10 of the Lever Act is in no sense to be regarded as an action upon the contract, express or implied, but that it is a plenary proceeding under the statute for the ascertainment and award of just compensation in all of its elements and aspects, in which the property owner is not forced to fall back upon any fiction of agreement as the only alternative to resistance.

THE FUNDAMENTAL DISTINCTION BETWEEN INTEREST AS SUCH, THAT IS, AS A PENALTY, AND INTEREST AS A MEASURE OF A SUBSTANTIVE ELEMENT OF COMPENSATION.

Having asserted the incorrect analogy of suit on a contract, the brief for the Government proceeds with the insistence that the property owner who accepts this form of action, that is, *ex contractu*, takes it "subject to the delays incident to all litigation and to the well-established principle governing such suits and the well-defined limitations which the United States had fixed with respect to its liability" (pages 9-10).

It is then suggested that among these limitations are the well-settled policies that interest is never recoverable on claims against the Government in the absence of a statutory enactment or of an express contract for the payment thereof. This conclusion having, as we have seen, been based upon an erroneous premise and an equally erroneous sequence, may also be shown to include further fundamental errors.

The conclusion loses sight of the fact that in any inquiry to determine just compensation for property seized a sum equal to or measured by interest may be allowed as an element of just compensation. Indeed, the brief for the Government (p. 12) quotes *U. S.* v. *Bayard*, 127 U. S. 251 (259) to the effect that "the only recognized exceptions are where the Government stipulated to pay interest and where interest is given expressly by an Act of Congress, either by the name of interest *or by that of damages.*" Of course, the same exception applies to statutes providing for the award of compensation which, to meet the requirements of the Fifth Amendment, must be construed as including every substantive element of compensation and damage to which the owner of property is entitled.

CASES CITED BY THE GOVERNMENT.

We do not conceive that it should be necessary to add anything to the elaborate discussion as to what constitutes just compensation which is set out in the Seaboard's Main Brief. The cases cited by Counsel for the Government (page 10), when properly analyzed, have no tendency to run counter to the contentions advanced on behalf of the property owner in this proceeding.

Tilson v. *U. S.*, 100 U. S. 43, was essentially an action for a breach of contract, a form of remedy being adopted by the pleader in which interest was claimed as such and as an incident merely to the principal amount found due for the breach of contract, and not as a primary element or measure of damages. In short, interest was claimed as a penalty, in the teeth of the statute.

Harvey v. *U. S.*, 113 U. S. 243, also arose out of a breach of contract. In that case interest was not claimed as a substantive element of compensation, but in its ordinary sense as a penalty for non-payment of the principal amount due by the United States. It is in the latter sense that interest is excluded by Section 177 of the Judicial Code (Sections 1090-1, Revised Statutes). It was not decided in *Harvey* v. *U. S.*, or in any other case before the Supreme Court to which our attention has been directed, that interest would not have been allowed as a measure of a substantive element of damages if, for instance, the machinery or equipment of the contractor in the *Harvey Case* had been impounded or tied up and the value of its use lost to the contractor because of some delay by the United States in violation of the contractor's rights under the contract.

In like manner in *U. S.* v. *Bayard*, 127 U. S. 251, interest was claimed as such, in its direct, technical sense, as a penalty for withholding money. The claim for interest

as such ran squarely counter to the statutory principle which the United States erroneously invites in this proceeding.

Such also was the situation in *U. S.* v. *North Carolina*, 136 U. S. 211. The remaining authority cited by counsel for the Government (*U. S.* v. *North American Trading & Trans. Co.*, 253 U. S. 330) has been sufficiently discussed in the Seaboard's Main Brief. With reference to that case we may further point out, to avoid any possible misunderstanding of our contention, that we do not contend that the claimant in that proceeding was entitled to recover compensation measured by interest on the record which reached the Supreme Court. Certain reasons for distinguishing the *North American Case* from the case at bar may be restated as follows:

1. The *North American Case* did not involve any attempt on the part of Congress, such as that alleged by the Government here, to limit the property owner to a suit upon some particular allegation of implied contract in which all elements of just compensation as laid down by the *Rogers Case* might not be recoverable. The statute under which the land in the *North American Case* was taken, the Act of August 18, 1890, c. 728, provided that the taking should be by condemnation. If the land had been formally condemned the case would have presented the same facts as the *Rogers Case*. The owner, however chose to acquiesce in the taking which he might have resisted by injunction proceedings (if the implied contract remedy, properly pleaded, was not adequate and full), and to consider the land as having been sold to the United States and to sue upon the implied promise to pay. The case does not hold that by juggling with the procedure for determining the amount of just compensation. Congress can eliminate an essential element of compensation guaranteed by the Constitution by forcing the owner to an inadequate remedy.

2. Having ratified the acquisition of its property by the United States by bringing suit on an implied contract, the claimant necessarily recognized title in the Government and could not contend that the property was still its own and that it was entitled to compensation as for use and occupation. The theories of contract (sale) and use and occupation were inconsistent.

3. The claimant in that case misconceived the nature of its remedy to recover full compensation by claiming—(a) the value of the land at the time of the taking and (b) the value of the use and occupation of the land between the date of seizure and the date of payment or judgment, that is, between the date of (implied) sale, and the date of the ascertainment of the (implied contract) value of the land; whereas its claim should have been a suit upon an implied contract arising out of the taking, which, to be lawful, must be acompanied by an undertaking on part of the Government to pay that which would be full compensation to the property owner *when by due diligence he gets the compensation*, that is, the value of the land at the time of the taking plus the value of the use to the property owner of his property or its constitutional equivalent of which he has been deprived.

SOLE QUESTION INVOLVED IN THIS CASE IS WHAT CONSTITUTES JUST COMPENSATION; THE SOLE QUESTION CONSIDERED AND DECIDED IN THE *ROGERS CASE* WAS JUST COMPENSATION; THE QUESTION DECIDED IN THE *NORTH AMERICAN TRADING & TRANSPORTATION COMPANY CASE* WAS WHAT WAS RECOVERABLE UNDER THE PLEADING AND ON THE RECORD IN THAT CASE, AND THAT INTEREST OR ITS EQUIVALENT WAS NOT RECOVERABLE UNDER A MISTAKEN CLAIM FOR USE AND OCCUPATION.

In the case at bar the court is not restricted in the onsideration of any and all elements inhering in just ompensation by any choice of remedies voluntarily acepted by the property owner as an only alternative to

resistance, or by any defective record or method of approach, for Section 10 of the Lever Act must be construed as a plenary inquiry for the rendition of full compensation. For the reasons stated at length in the Seaboard's Main Brief, it is plain that the present inquest contemplates the award of every element of compensation which would properly be allowed in a proceeding in which the United States had initiated the inquiry in its own name and had taken possession prior to the award of compensation, as under the Act of July 2, 1917 (40 Stat. L. 241), or as was the case in *U. S.* v. *Rogers*, 255 U. S. 163.

The inquiry before this court is therefore much broader and more fundamental than is suggested by the summary stated by Counsel for the Government on page 30 of the brief, in which the question is sought to be ticketed into the category of the *Rogers Case* on the one hand or of the *North American Trading & Transportation Co. Case* on the other. There is danger in that sort of classification. It tends to obscure the principles involved by tagging them with the names of particular remedies, such as the inquiry whether this is a condemnation or compensation proceeding, or a contract action. If an element of just compensation under the Fifth Amendment in any particular case may properly be measured by or in terms of interest, that element or its equivalent ought to be recoverable if properly presented without reference to the form of action—if intelligently pleaded and supported by the proof. If not a proper element or measure it ought not to be recoverable in either form of proceeding.

It is respectfully submitted that a judicial statement of the grounds for affirming the judgment of the District Court might more appropriately be placed upon an analysis of the right of the property owner under the Constitution; upon a recognition of the necessity that any

remedy purporting to award just compensation must be co-terminous with the rights of the property owner under the Constitution, and a conclusion that Section 10 of the Lever Act contemplates such an adequate remedy.

When we have reached, as inevitably we must, this point, the sole question remaining is whether a substantive and primary element of compensation can ever be measured by or in terms of interest. The question must on the authority of the *Rogers Case* and the many cases cited in our Main Brief on the discussion in the *North American Company Case* be answered in the affirmative.

The *Rogers Case* dealt solely with the question of compensation. That is the sole question involved on this record. Therefore the principle announced in the *Rogers Case* is applicable here. The *decision* in the *North American Company Case* dealt exclusively with the nature of damages recoverable under the pleading and on the record in that case, in which the claimant plainly misconceived his remedy by claiming for use and occupation when he admitted that he had sold the property and only held a contract for its fair value.*

No such questions are presented by this record and the rule principle actually decided in the latter case (that interest is not recoverable under an erroneously urged claim for use and occupation) is not applicable here. The observations by the court *arguendo* in that case, to the effect that where compensation is the subject matter of the inquiry, an allowance measured by interest is appropriate, are pertinent. There is no conflict between the *Rogers Case* and the *North American Case*. The judg-

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* A familiar principle is that one who enters into possession of land by virtue of an agreement or understanding that he is to be purchaser and, cannot be held liable for use and occupation if the purchase be finally concluded. *Carpenter* v. *U. S.*, 17 Wall. 489; *Merchants Exchange Co. Case*, 1 Ct. Cls. 332; *Cummings et als.* v. *U. S.* (No. B-184, Ct. Cls., decided November 6, 1922).

ment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed upon the authority of *both* cases.

Respectfully submitted,

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